



# In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SANTIAGO AINSA, ADMINISTRATOR OF the estate of Frank Ely, deceased, and Edward Camou, appellants, <i>v.</i> THE UNITED STATES.	} No. 40.
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*APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.*

**AGUA PRIETA GRANT IN ARIZONA.**

## **BRIEF ON BEHALF OF THE UNITED STATES.**

On February 28, 1893, the appellant Ainsa, as administrator, filed his petition against the United States and Hugh H. Whitney for what is known as the Agua Prieta grant, alleging that the last-named defendant held or claimed a portion of the grant by virtue of a patent from the United States. The material averments of the petition are as follows:

That he claims the grant as such administrator by virtue of a "grant title," dated December 28, 1836, made by the Mexican Republic by virtue of article 11 of decree No. 70, passed August 4, 1824, by the sovereign constituent Congress of the United States of

Mexico, stating that the article in question concedes to the States of the Republic of Mexico the rents and revenues which by said law are not reserved to the General Government, one of which revenues is the vacant lands within the respective States, which said lands in consequence belong to such States; for the disposition of which lands under said decree the constituent congress of the State of Sonora and Sinaloa passed a law, No. 30, bearing date May 20, 1825, and other decrees relative thereto by successive legislatures, which decrees are embodied in sections 3, 4, 5, 6, and 7 of chapter 9, of the organic law of the treasury, said law being No. 26, and dated July 2, 1834. (R., 1, 2.)

That regular and lawful proceedings were had under said laws, by which the Mexican Government sold and conveyed to Juan, Rafael, and Ygnacio Elias Gonzales, in consideration of \$142.50 and other valuable considerations set out in the "grant title," the said *Agua Prieta* grant. (R., 2.)

The proceedings referred to are set out at length in the petition, and, as disclosed by it and the title papers, were briefly as follows:

On July 21, 1831, Juan, Rafael, and Ygnacio Elias Gonzales petitioned the treasurer-general of the State of Sonora, Mexico, for the water and lands of Santa Barbara, Naidenibáachi, *Agua Prieta* and Cabuyona (R., 360). On August 12, 1831, the treasurer-general ordered an investigation to inquire if the petitioners had the number of cattle they claimed to have, and also if the lands owned by them were not sufficient to

support their cattle, and whether or not they needed the lands asked for in their petition (R., 117, 118). Investigation was made by the proper officer and reports made to the treasurer-general, which satisfied him that the petitioners ought to have the lands prayed for (R., 118-121), and he so ordered (R., 121). Whereupon a commission was issued to the citizen Joaquin Vicente Elias, a resident of San Ygnacio, to survey the said lands (R., 121, 122), which, however, was postponed till August 20, 1835, on account of the alleged inroads of the Indians (R., 122), on which latter date the interested parties were notified by the commissioner (R., 122, 124), and the adjacent owners summoned, and official surveyors, accountants and markers appointed (R., 124, 225), and a survey of the Agua Prieta made on September 28 and 29, 1835 (R., 125, 126), a calculation of which resulted in 6 short sitios (R., 126). On the following days surveys of the other lands asked for were made (R., 126-128). On October 1, 1835, the lands of Agua Prieta, being then stated at  $6\frac{1}{2}$  sitios, were appraised by officers appointed by the commissioner for that purpose, one of the sitios being appraised at \$60 because it contained limited water, and the other  $5\frac{1}{2}$  at the rate of \$15 each, as they were absolutely dry (R., 128, 129), and appraisement of the other lands petitioned for was also made at the same time, the total, including the Agua Prieta, being appraised at \$432.50.

These lands were then offered for bids at Arispe, the capital of Sonora, for thirty consecutive days from



June 4, 1836, to July 4, 1836 (R., 130-135), but there were no bidders.

The petition then continued (R., 4):

The proceedings being finished, they were, on July 7, 1836, forwarded to the treasury (R., 136), which, by decree of September 9 of said year, forwarded them to the solicitor of the treasury (R., 136), who, on September 12, 1836, submitted his opinion, \* \* \* and stating that there was no obstacle to prevent the treasury from ordering the public auction by the board and issuing the proper title of transfer in favor of the interested parties or of the highest bidder. (R., 136.) The treasury-general, being satisfied with this opinion of the solicitor, by decree of September 15, 1836, made order to proceed to the three public auctions on the same day and on the next two succeeding days of said month (R., 137), and, there being no bidders, the said 18 sitios and 12½ caballerias of land were auctioned off to the citizens Juan, Rafael, and Ygnacio Elias Gonzales, as appears by the record thereof in said expediente. (R., 137-139.) On the same day it was ordered that the said Rafael Elias, for himself and in the name of his copartners, should proceed to pay into the treasury the \$432.50, the value of all said lands, which he thereupon did. The proper certificate, signed by the treasurer-general in proof of the said payment (R., 139), was thereupon joined to the expediente, and the said lands, as measured and surveyed, were, in due form of law, granted, given, adjudicated, and sold and conveyed by a complete

and perfect title in fee to the said citizens, Juan, Rafael, and Ygnacio Elias Gonzales, and their heirs and successors; and the said title was thereupon recorded, in compliance of law, in the archives of the treasury-general at Arispe, in the State of Sonora, on page 41, and the other side of it of the Book of Toma de Razon for the year 1836. (R., 140.)

The petition then recites that the original or first copy or testimonio of said grant is not in plaintiff's possession; that the firm of Camou Brothers, composed of Juan Pedro Camou and Pascual Camou, of Guaymas, Mexico, claiming to be the successors in interest of the original grantees, on February 26, 1875, presented their petition to the surveyor-general of Arizona under the act of Congress of July 22, 1854, praying for the confirmation to them of the lands known as Naidenibacachi, Agua Prieta, and Santa Barbara, and filed therewith the original or testimonio or first copy of said grant of lands, the same being that under which the petitioner claims; and that afterward said testimonio or original title was returned to said Camou Brothers, and is now in their possession.

That when so deposited with said United States surveyor-general, the said title papers were examined, and it was found that the original expediente thereof was found in its proper place in the archives, and its regularity in other respects was discovered (R., 5); that said original testimonio or first copy of said grant was recorded on May 1, 1867, in the office of the recorder of deeds of Pima County, Ariz., and two certified copies of such record are filed. (R., 6.)

That no further action has been taken by the United States relative to said grant. (R., 5.)

With other allegations of ownership and possession, and that no other persons claim said grant except by the license or permission of said petitioner, other than said Whitney and one other person, to the petitioner unknown, and specifying by sectional description the lands claimed, the petition closes with the usual prayer for relief. (R., 6.)

The answer of the United States was filed March 16, 1895 (R., 9), and after denying the ownership and possession of the plaintiff, it states that if the State of Sonora undertook to grant said property it was without warrant or authority of law, and void, for the reason that the said State of Sonora did not have the title to the property, the same being vested in the National Government of Mexico, and that whatever proceedings may have been had under the State laws were null and void, and passed no title against the National Government.

That at the time of the issuing and recording of the grant, Sonora was a department under the National Government and its officials were prohibited by law from disposing of the public domain until the National Government should provide regulations therefor.

That the grant claimed is located within the Republic of Mexico, and therefore not within the jurisdiction of the court.

That the said grant had been in 1882 confirmed to Camou Brothers by the Mexican Government, after

investigation and survey thereof, and as such lies south of the international boundary line; that the *demasias* of said grant was also confirmed at such time to said Camou Brothers, and that a large area still existed between the north boundary of said grant and the *demasias* and the international boundary line, which has since been purchased from the National Government by said Camou Brothers.

That said grant was, prior to the treaty of Mesilla, on November 25, 1853, by lawful authority of the Republic of Mexico, pending a negotiation of said treaty, declared to be null and void.

The answer concluded with a prayer that the court find that said grant lies wholly within the Republic of Mexico, and that the claim be rejected and the petition dismissed. (R., 11.)

On March 16, 1895, the plaintiff filed his amended and supplemental petition, as follows (R., 11-12):

\* \* \* Petitioner avers that prior to the treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by anyone, and that neither the grantees nor their successors in interest had, prior to said treaty, any knowledge or notice that within the said monuments there was an excess of land over the area stated in said title papers, and petitioner avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and

retain the same as their own, even after such overplus is shown, without other obligation than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised; and petitioner further avers that if this honorable court should decide that said sale, as recited in said title papers did not, as petitioner avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due therefor is ascertained.

Wherefore, petitioner now tenders to the United States of America and offers to deposit with the clerk of this honorable court of the United States of America the sum of \$600 in gold coin of the United States of America as payment for all such overplus or surplus of lands in said grant, according to their quality and the price which governed when they were surveyed and appraised, and the further sum of \$200 in like gold coin for the costs of ascertaining and determining the existence or nonexistence of such surplus, and prays that this court order the clerk of said court to accept said sum as such tender; and, as aforesaid, offers to pay said amount or any amount which may by this honorable court be adjudged to be due for such overplus or surplus, and prays that upon said payment this honorable court decree that peti-

tioner is entitled to and is the owner of all of said tract of land, as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the possession and ownership of the whole of said tract; and petitioner prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be and always to have been a complete and perfect and unconditional title in fee, and that petitioner be adjudged to be the owner in fee thereof, and for such other and further relief, etc.

The area claimed to be included in the grant, as shown by the exhibits (maps) filed by the petitioner, is 163,797.48 acres.

The court below held the grant to be of no validity, and rejected the claim and dismissed the petition (R., 370). The opinion of the court, delivered by Mr. Justice Murray, is found in the record, pages 373 and 374. A large amount of testimony was taken at the trial in the attempt to establish a major portion of the grant to be within the United States.

The plaintiff tendered in evidence a certified copy of the *expediente* and the *toma de razon* of the grant, covering three tracts of land, called, respectively, *Agua Prieta*, *Naidenibácachi*, and *Santa Barbara*, from the archives under the control of the treasurer-general of Sonora, as Exhibit A (R., 98), and translation thereof as Exhibit C (R., 116); also the *título* to the same as Exhibit E (R., 141), and translation thereof as Exhibit F (R., 153).

Following the Government's translation of the *titulo* (R., 360), which differs materially from that tendered by the claimant, it appears that, on July 21, 1831, Juan, Rafael, and Ignacio Elias Gonzales made a petition to the treasurer-general of the then State of Sonora, stating that in the lands of San Pedro and Cienega de Heredia belonging to them, and situated in the jurisdiction of the presidio of Santa Cruz, they have cattle and sheep, whose numbers they can not feed in the *sitios* belonging to them, for which reason their stock wander to the four points of the compass, more particularly toward the water of the Santa Barbara, Naidenibáachi, Agua Prieta, and Cabuyona, by which they suffer incalculable damage, because as they are public lands everybody who wishes enters freely into them, gathers and runs off stock, and, because of this condition of doing as one pleases without their consent or permission being necessary, the consequences are outrageous robbery and that the cattle are driven farther and farther away; and in order to obviate such damages and that their breeding lands may be sufficient for the number of cattle they have and "which ought soon to be increased, notwithstanding the continued damages the Indian enemies of war cause, we find ourselves in the case of making formal denouncement, as we hereby do, of the lands that may be found to be public land within the points and waters mentioned, which are bounded on the north by the Chiricahua Mountains; on the south by the lands of the Sinaloa; on the east by the Cabuyona Mountains,

and on the west by the lands of the Saus. Therefore, we petition and pray your excellency to be pleased, under the law of May 20, 1825, and the power given you by article 22 thereof, to admit the denouncement we make of said lands and to issue the corresponding order for the survey, appraisement, publication, sale, and other proceedings necessary to be executed thereon until the issue of the title and agree to pay the fees, costs, and whatever is necessary." (R., 361.)

On August 12, 1831, Treasurer-General Mendoza referred the petition to the second alcalde of the city of Arizpe, with directions for a hearing as to whether the petitioners have the number of sheep and cattle they claim, whether their holdings are positively insufficient for the support of this stock, whether they have need of "all or any part of the unappropriated public lands and watering places" petitioned for, and whether the lands petitioned for are "outside of the boundaries of the border presidios." (R., 118.)

Testimony was taken by the alcalde, and a report was thereupon presented to Mendoza (R., 117-121). On October 10, 1831, at Hermosillo, Mendoza having received the report upon the propriety of proceeding upon the petition of the said petitioners, appointed Joaquin Vicente Elias, resident of San Ignacio, without damage to third parties who might have a better right, having first summoned adjacent owners to "proceed to take the legal steps to survey the said public lands, effecting the measurement, appraisement, and posting as provided in the sovereign decree of the con-



stituent Congress of the United States that was No. 30, of May 30, 1825, and its proper resolutions, and also as is provided in the decree No. 175, of November 20, 1830, and other determinations and regulations extant on the subject, and said proceedings having been executed, he should send the originals to this treasury, summoning the interested parties to appear in person or by attorney at the auction of the said lands, which must take place in an auction sale in this city." (R., 121-122.)

Joaquin de Elias, supposedly Joaquin Vicente Elias, accepted the appointment and postponed the survey, appraisement, and advertisement "till the inroads of the Indians, barbarians, become less frequent." (R., 122.)

Nearly four years thereafter, at Arizpe, on August 20, 1835, said Joaquin de Elias, reciting that the atrocities of the barbarous Apaches have abated somewhat, undertook to execute the commission given him by Mendoza, dated October 10, 1831, but before doing so stated it was necessary to notify the interested parties in order that they might be present either in person or by attorney and witness the measuring of said lands. (R., 122, 123.)

Two of the petitioners, Juan and Rafael Elias Gonzales, being present, he notified them and they appointed Fernando Lueke as their attorney. (R., 123.) Notice was given to owners. (R., 123, 124.)

At the place of Agua Prieta, on September 28, 1835, the commissioner appointed and qualified his assistant

measurers and counters (R., 362), and thereupon proceeded to the survey of the Agua Prieta tract (R., 362, 363).

Omitting the preliminary statement, that survey was as follows:

At the place of Agua Prieta, on September 28, 1835, the attorney for Messrs. Elias was asked to point out the place they wanted as the center, and he pointed it out in a lake which is in the middle of a valley which has the name of said place and covers its whole circumference.

(1) "Then the course to the south was observed and along it they went, scrupulously measuring and counting 59 cords, which terminated in a thicket of willows which are in the middle of the valley." These were to serve as a monument until one of masonry should be erected as required by law.

(2) "Having returned to the center, the course to the north was observed, and up the valley there were measured 100 cords, which terminated on a very small hillock (*lomita*), fronting on the east with what they call Saddle Pass." A heap of stones was caused to be placed there and a cross to mark the place for the monument.

(3) "Having returned to the center, the direction of the east was taken, and along it there were measured and counted 168 cords, which terminated on a high hillock (*loma*) which is to the right of the pass where the old road passes from Santa Cruz to San Bernardino," where the surveyor ordered to be placed a heap of stones and a cross for a monument.

(4) "Having returned to the center, the course to the west was taken, and along it there were measured and counted 240 cords, which ended a little beyond where the mountain seen in this direction terminates, on a broad red hill (*cerro*) that has a brow on the south side and fronts on the west the highest part of the San Jose Mountains." A heap of stones and a cross to mark the place for a monument were ordered placed there.

This concluded the survey for the day.

(1) At Agua Prieta, on September 29, 1835, the following day, the perimeter of the land was run (R. 363), conforming the end and side lines to the center lines in direction and distance, as follows:

"I, the commissioned judge for the purpose of continuing the course of these proceedings, proceeded with the appointed assistants to the place for the north monument, and having observed the course to the east there were measured and counted along it 168 cords, which terminated near Saddle Pass on a small hillock (*loma*), which is to the right and near two others that are higher." A pile of stones and a cross were ordered put to mark the place for the monument.

This line established the north boundary east of the north center monument, on a line which should be practically parallel with the line east from the center monument, and also fixed the northeast corner of the survey, which was the subject of most of the controversy at the trial.

The survey was then continued, as follows:

(2) "Having returned to the place for the north monument from which the measurement started, and the course to the west having been observed, there were measured and counted along it 240 cords, which terminated on a small hill (*cerro*), which is in front of the cross monument in said direction, where another and a cross was caused to be placed." This line fixed the north boundary from the north center monument west to the northwest corner.

(3) The west line of the perimeter of the grant, starting at the northwest corner, is thus described: "Thence, observing the course to the south, there were measured and counted 89 cords, which terminated at the cross monument of the west course" (supposedly the west center monument), "and continuing in the direction of said south course there were measured 60 cords, which terminated at the foot of a high hill (*cerro*) facing on the south another hill that has a dark crest and on the east a pass, which on the left has two hills (*cerros*) and is made up of several red peaks," where the usual heap of stones and cross for a monument was ordered placed. This concludes the west boundary and establishes the southwest corner of the survey.

(4) "Having observed the course to the east from this point, there were measured and counted 240 cords, which terminated at the south cross monument, in the thicket of willows that have been mentioned before."

(5) The east-half of the south line and the whole of the east line were simply estimated and not meas-

ured. Starting from the south center the survey states:

From there there were estimated 178 cords, on the course to the east, to the foot (*falda*) of the first pass which is to the right of the point where the cross monument of said course came, both points being on a straight line at the foot (*falda*) of the Perillo Mountains.

This concludes the south boundary, and establishes the southeast corner.

(6) "Thence [measuring from the southeast corner] on a course to the north, there were estimated 59 cords, which terminated at the east cross monument" (evidently meaning the east center monument).

Nothing appears to show any connection being made between the east center and the northeast corner by actual measurements or even by estimation.

The survey of the Agua Prieta tract is concluded in the following language:

The survey being in this manner concluded, and containing in its area, the calculation having been made with absolute correctness,  $6\frac{1}{2}$  short sitios. The party, who stated that he was satisfied with what had been done, was cautioned to inform his parties in due time to have monuments of stone and mortar constructed, as is provided (R., 363, 364).

The remainder of the survey pertains to the Santa Barbara and Naidenibácachi tracts, containing an area of  $11\frac{1}{2}$  sitios and  $12\frac{1}{2}$  caballerías, which added to the  $6\frac{1}{2}$  sitios included in the Agua Prieta survey, made a

total of 18 sitios  $12\frac{1}{2}$  caballerias. The Santa Barbara and Naidenibáachi tracts are not here involved, so that the survey and sale of the Agua Prieta tract is the only part of the proceeding that will be considered in this brief.

On October 1, 1835, the acting judge commissioner of the survey, Joaquín Vicente Elías, designated as appraisers two of the persons who had accompanied him on the survey just concluded, and thereupon said appraisers (R., 129-365), having accepted said appointment and made oath in due form of law, well and truly to discharge the duties of said office, reported as follows:

They said that the  $6\frac{1}{2}$  sitios comprised in the survey of the Agua Prieta they held to be worth for 1 sitio \$60, on account of its containing a limited water course (or watering place), and the others to be worth \$15 each, as they consisted of absolutely dry land, making the total amount of the appraisement \$142 and 4 reals (R., 129).

Thereupon the lands were published for thirty consecutive days at the value fixed, in solicitation of bidders, from the 4th of June till the 3d of July in the year 1836 (R., 129-136).

The terms of the advertisement for bidders published throughout said thirty days (the italics being the writer's) were as follows (R., 130):

At the city of Arispe, the capital of the department of Sonora, on the 4th day of the

month of June, 1836, I, the aforesaid commissioner, in order to put into effect what has been ordered in the foregoing mandate, caused an offer for bids to be made by the beating of the drum by the police officer, Loreto Salcedo, which offer was actually made in these terms: There are for sale on account of the public treasury *eighteen sitios and twelve and one-half caballerias* for raising cattle, which compose the place Agua Prieta, Naidenibacachi, and Santa Barbara, surveyed in favor of the citizens Juan, Rafael, and Ignacio Elias Gonzales, which are appraised in the sum of four hundred and thirty-two dollars and four reals. Any one who wishes to bid more than this appraisalment may come before me as commissioner, where his bid will be received.

At the close of the advertisement of thirty days the promotor fiscal, to whom the matter was submitted by order of the treasurer-general, reported that there was no obstacle to prevent the treasury from ordering the public auction by the board and to issue the proper title of transfer in favor of the interested parties or of the highest bidder (R., 136).

On September 15, 1836 (R., 137), the treasurer general ordered three public auctions in due form to effectuate the final sale of the land of which said proceeding treated, and for that purpose orders that the members of the board of sale be summoned to appear at his office. The three *almonedas* or offers of sale were thereupon had on September 15, 16, and 17, 1836 (R., 137-139). In view of the question of quantity in

this case the advertisement of the property for sale is quoted, as follows (R., 137):

There are going to be sold on account of the public treasury of the department *eighteen sitios and twelve and one-half caballerias* of land for the raising of cattle and horses, comprised in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, in the district of this capital, surveyed at the request of the citizens Juan, Rafael, and Ignacio Elias Gonzales, of this town, and appraised in the sum of four hundred and thirty-two dollars and four reals, as follows: The *six and one-half sitios*, which compose the survey of Agua Prieta, one in the sum of sixty dollars, on account of having a small spring, and the other five and one-half at the rate of fifteen dollars each, on account of their being absolutely dry; and the other eleven and one-half sitios, together with the twelve and one-half caballerias, of which the other two places consist, one in the sum of eighty dollars, one in the sum of sixty dollars, and the others at fifteen dollars each, all of which sums together go to make up the total amount of four hundred and thirty-two dollars and four reals. Whosoever wishes to bid on the said land, let him come forward and make his bid in due form before this commission, where his bid will be received with the understanding that on the day after to-morrow the sale will stand concluded in the highest bidder.

After advertisement, on September 17, no bidder



appearing, the board of sale, consisting of the treasurer-general, Milla, the judge of the first instance, Julian Padilla, and the promotor fiscal (attorney-general), Pedro Rodriguez Guzman, proceeded to hold the third and last auction "for the sale of the *18 sitios 12½ caballerias* of land comprised in the places known by the name of Agua Prieta, Naidenibacachi, and Santa Barbara." The record of final sale (R., 138) is as follows:

At this time there appeared the citizen Rafael Elias, bidding for himself and in the name of his partners, the citizens Juan and Ignacio Elias Gonzales, the above-named sum of \$432 and 4 reals, at which the said lands were appraised; and the midday bell of this day having now struck without a bidder appearing who offered more, the auctioneer at last said in a loud and clear voice "for the first time, for the second time, for the third time, going, going, sold to the said Rafael, Juan, and Ignacio Elias Gonzales."

On these terms this act was concluded, *the said 18 sitios 12½ caballerias* of land which compose the said places of Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, having been publicly and solemnly sold to these interested parties for the said sum of \$432 and 4 reals, at which said lands had been appraised.

On September 17, 1836 (R., 139), José Justo Milla, the said treasurer-general of the department of Sonora, recites that "the sale of the *18 sitios and 12½ caballerias*

of land for raising cattle and horses, which comprise the places called Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras," have been concluded in favor of the parties named, and directs that the purchasers should be notified that they must proceed to pay into the treasury of the department of Sonora, under his control, the said sum of \$432 and 4 reals, for which said lands were publicly sold, and upon certificate of payment made in the usual form being attached to the proceeding, title of sale shall be issued to the interested parties for their protection, according to law. The expediente bears indorsement (R., 139) that the title of the sale of the land to which the expediente refers was issued on December 28, 1836.

A copy of this title so issued was tendered by plaintiffs (R., 27, 153): the Government's translation of the same appears in the record, pages 360-370. From this document it appears that the title was issued by José Maria Mendoza, treasurer-general of the department of Sonora on the date above given, to wit, December 28, 1836, pursuant to the proceedings above set forth, and that the purchase money for said "18 *sitios* 12½ *caballerias* of land for breeding cattle and horses, contained in the places called Agua Prieta, Naidenibacachi, and Santa Barbara" (R., 162) was paid on December 26, 1836. The caption of said titulo or patent is as follows (R., 360):

Title to the grant of 18 *sitios* 12½ *caballerias* of land for breeding cattle and horses, which

are comprised in the places called Naidenibacachi, Agua Prieta, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, issued by the treasury-general of the department of Sonora, in favor of citizens Juan Rafael and Ignacio Elias, residents of this place.

The granting clause used in the titulo or patent (R., 368) is as follows:

Therefore, in the exercise of the powers the laws give me, by these presents and in the name of the Republic of Mexico, I grant, in due form of law, *18 sitios 12½ caballerias* of land for breeding cattle and horses contained in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, situate in the jurisdiction of the presidio of Fronteras, in this district of this capital, to citizens Juan, Rafael, and Ignacio Elias Gonzales, to their heirs and successors,  
 \* \* \* and I order and command the judges, justices, and authorities \* \* \* not to permit the said parties in interest nor their heirs to be in any manner annoyed, disturbed, or molested in the free use, exercise, right of property, dominion, and possession of the said *18 sitios 12½ caballerias of land* contained in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, etc.

Plaintiffs introduced in evidence a certified copy of the entry in the book of *toma de razon* of the issuance of this titulo, said *toma de razon* being as follows (R., 140):

On December 28, 1836, there was issued the title of sale of *18 sitios 12½ caballerias* of land

for raising cattle and horses, which comprise the places of Naidenibacachi, Agua Prieta, and Santa Barbara, in the jurisdiction of the presidio of Fronteras, in favor of the citizens Juan, Rafael, and Ignacio Elias Gonzales, of this city. (Signed) Mendoza. [Rubric.]

On the trial of the cause, plaintiff Santiago Ainsa, administrator of the estate of Frank Ely, deceased, introduced in evidence a number of deeds made by certain descendants of the original grantee to plaintiff's intestate and the latter's predecessors in title. These deeds range in date from December 24, 1886, to January 24, 1893 (R., 164-179), and in connection with the testimony of Lola Elias (R., 180-182), introduced by plaintiff, establish the fact that if the Eliases who sold to Frank Ely, deceased, in 1886 and later, had not previously disposed of such interests as they had in the grant, the said deeds invested the plaintiff with sufficient title to prosecute the suit and to invoke the judgment of the court upon his claim. It was contended by the Government, however, under the issue made by its answer (R., 9), that Santiago Ainsa had no ownership in any part of the land described in the petition, either as administrator or trustee, for the reason that the Eliases, who sold to Ely, had previously sold the same property to the Camous, and in support of this issue the defendant tendered in evidence, on the trial (R., 271), a deed made by the Eliases, dated July 25, 1862, conveying to the Messrs. Camou, of Hermosillo, Mexico, all of the property forming the subject-matter of this suit, and also a certain proceed-

ing dated March 17, 1869 (R., 276), and a further proceeding initiated November 15, 1880 (R., 349), showing that the equity of redemption existing under the conditional sale from the Eliases to the Camous, just mentioned (R., 271), subsequently became extinguished, and the full title to this property became thereby vested in the Camous (R., 356). Plaintiff's counsel apparently recognized the strength of this testimony on behalf of the Government, and presumably in order to have before the court some one undoubtedly connected with the title, on May 31, 1899, moved the court for an order making Eduardo Camou party plaintiff to the cause, and presenting a deed from Juan Pedro Camou to said Eduardo Camou, covering the grantor's interest in the Agua Prieta grant north of the international boundary line. This deed is a quitclaim deed, *dated subsequently to the beginning of the trial of the cause*, and the propriety of the action of Mr. Camou in making the deed in the form of a quitclaim will be more fully appreciated hereafter when it is seen that his predecessors in title withdrew the Agua Prieta grant from the consideration of the surveyor-general of Arizona on the ground that no part thereof lay in American territory. It is quite evident that Juan Pedro Camou was unwilling to stand sponsor for the proposition that any part of this grant lay in the United States; and at the same time he was willing to make a quitclaim deed so as to allow his son Eduardo Camou to take his chances of getting something out of a claim against the United States that the father did not be-

lieve to be well founded. The title of Ainsa being disproved by the record, the case, in the view of the Government, stands upon the interest of Eduardo Camou deraigning title under Juan Pedro Camou in a proceeding initiated for the confirmation of this grant on May 31, 1899, the date when the court allowed him to come in as a party to the cause. Even as to Eduardo Camou there is no proper connection with the title, there being nothing to show how Juan Pedro Camou got title from Pascual Camou, who was the owner of the grant in 1881 (R., 261).

On the trial of the cause plaintiffs introduced Eduardo Camou, who testified that he was the son of Juan Pedro Camou, and that he had been requested by plaintiffs' attorney to bring up to court the original title papers of the Agua Prieta grant, which were in the possession of his father, but that the latter was afraid to trust them out of his possession, as they were very old (R., 27). Considering the fact that Mr. Juan Pedro Camou, if plaintiffs' contention as to boundaries is correct, was at the date of the trial of this suit the owner under the Agua Prieta title of over 68,000 acres of land in Arizona, the fact that he would not allow the original title to leave his hands for the purpose of sustaining a claim to this princely domain is almost as instructive on the subject of his belief in the location of this claim as are the acts of his predecessors and associates in title, to be hereinafter discussed, in declaring in 1880 (R., 359) that this grant lay entirely within the Republic of Mexico, and in participating in 1880-1886 (R., 190-241)

in at least two surveys under the Mexican Government, fixing this grant entirely south of the international boundary line.

The leading witness examined in chief in behalf of claimants in the trial below was Ignacio Bonillas, who testified (R., 13) that he was a mining engineer and surveyor; that the Spanish language was his native tongue; that he had been trained as a mining engineer in the Massachusetts Institute of Technology, in Boston; that he had had an experience of fifteen or sixteen years in surveying lands, both in Arizona and in the State of Sonora, Mexico, and that he had held various positions of trust in the State of Sonora. He testified that he had made a survey of the Agua Prieta grant on behalf of claimants and had made a map of such survey, which was tendered in evidence as plaintiffs' Exhibit I, and is found in the record opposite page 24.

Mr. Bonillas testified (R., 14) as to the details of this survey made by him in October, 1895. He stated that he engaged as his guide on this trip one Francisco Valencia, of the town of Oputo, Sonora, alleging that said Valencia had been for many years familiar with the country thereabouts, and that he also consulted with two other persons concerning the points mentioned in the title papers and as to where the monuments were originally established. Neither Francisco Valencia nor the two other parties were produced by the plaintiffs on the trial of the cause in support of the names and topography shown by Mr. Bonillas in his survey; and the only testimony to the effect that such

names apply to certain natural objects is Mr. Bonillas's hearsay testimony as to what these parties told him. Mr. Bonillas testified that the initial or starting point of the survey of this grant is a pond called Agua Prieta, meaning black water, from which the grant has derived its name, said point being situated in the Agua Prieta Valley, known in Arizona as Sulphur Spring Valley, about 3 or  $3\frac{1}{2}$  miles south of the international boundary line. It may be here stated that there was no controversy on the trial about the location of this natural object constituting the center of the grant. Bonillas testified further that from the initial point he went down the valley in a southerly direction to the place known as Los Sauces, so called from the existence at that point of a growth of willows, which form quite a noticeable feature in the valley, as for miles around no others are to be found, either now or, according to the statements of old inhabitants, at any time within their recollection. Witness found no pile of stones exactly at the clump of willows (R., 15), but a short distance to the east, at the border of the valley, he found an old pile of stones which he adopted as the south cruz or south center monument of the grant.

Witness testified that, starting from the initial point of the Agua Prieta, he went up the valley in a northerly direction, searching carefully for the north center monument, which, it will be recalled from the expediente, was *ordered* placed 100 cords north of the Agua Prieta and "*on a very small hillock (lomita) fronting on the east with what they call Saddle pass.*" Witness stated



that he spent three days with three assistants looking for this monument, but was unable to find any monument to answer the calls of the title papers. His opinion was that the original monument had been swept away by the floods, as, judging from the description of the title papers, the country is very flat in the locality where the monument must have been placed. In view of the fact that the title papers put this monument on the top of the small hillock, it is difficult to account for witness's theory as to its being placed on a flat. Witness stated that in searching for this monument the Puerto de la Silla, or Saddle pass, was pointed out to him from the valley, and that his search extended both north and south of a line running westward from said pass at right angles from the course of the valley. He did not state who pointed out this pass to him, and no testimony was produced on the trial from anyone living in the vicinity of the locality that this pass was so called, although two witnesses living in the immediate vicinity were sworn by plaintiffs.

Bonillas further testified that the east cruz or east center monument is "so precise and clear" in the original field notes that he encountered no difficulty in identifying it. The position of this monument, as stated in the expediente, is, it will be recalled (R. 363), a point at a distance of 168 cords eastward from the center, terminating "on a high hillock which is to the right of the pass where the old road passes from Santa Cruz to San Bernardino," presumably the old

road in 1835, the date of the title papers. Bonillas testified that he inquired of people from Fronteras and Santa Cruz, who traveled forty or fifty years ago over the road leading from the latter town, then a presidio, to San Bernardino, and from a man who was a soldier among the escort of the Mexican Boundary Commission while making the original survey of the international boundary line (in 1855), and that he learned from them that the road from Santa Cruz to San Bernardino crossed the Ceniza or Perillo range of mountains through the Gallardo pass, running north of a butte called Gallardo, and that the same road is traveled to-day, as it is the most direct road between the two places mentioned and one which offers less difficulties to travelers, both on vehicles and on horseback. He stated that, accompanied by his guide, he followed this old road from the center of the valley eastward to Gallardo pass, where the international boundary monument No. 82 is located, and from there he went to the top of a high hill which rises to the right or in a southerly direction, where he found a large old monument of loose stones, at the foot of which a cross formed of stones can be clearly defined. It may here be remarked that the contention of the Government is that the above-mentioned "old" road was opened in 1855 and that the Bonillas east center is in the immediate vicinity in which the *northeast* corner of 1835 was fixed, the east center of that survey being, as contended by the Government, 2 or 3 miles farther south, at what is described in the testimony as the Misa pass.

Mr. Bonillas also refers to the position of the west cruz or west center monument as being described with "accuracy and clearness" in the grant papers, taken in connection with his examination on the ground. After describing the general geological formation of the Naidenibacachi Mountains lying to the southwest of the Agua Prieta, he describes (R., 16) a red hill sloping toward the north having on its summit a ledge of rocks resembling an eyebrow, which is the literal meaning of the word *ceja* used in the title papers in describing this hill, at which point he found a large pile of stones very much like the alleged east center monument at Gallardo pass, even in the circumstance of having at its foot a well-defined cross of loose stones.

Going back to the east boundary, Bonillas states that he found the northeast corner at the place described in the title papers. The expediente, it will be recalled, places the northeast corner (R., 363) at a point 168 cords distant from the north center monument, and on the course to the east therefrom, and "near Saddle Pass on a small hillock (*loma*), which is to the right and near two others that are higher." Bonillas testified that Puerto de la Silla, or Saddle Pass, was pointed out and described to him with all precision possible. He does not state by whom this was done, and no witness was produced on the trial of the cause to testify from residence in the locality that this pass was so called; but, on the contrary, neither of the witnesses living in the locality produced by plaintiffs in rebuttal, John H. Slaughter (R., 78) and

Eduardo Camou (R., 83), were asked about, or testified to, any such pass. Bonillas testifies that this pass is the first one next north of Gallardo, and is so called from the perfect outlines of a saddle formed by the profile of the northern extremity of the Perillos or Swisshelm Mountains, the horn of the saddle being formed by College Peak, also known in the locality as Silver Peak. The location of the northeast corner was one of the issues of fact on the trial of the cause, the contention of the Government being, as above stated, that this corner was in the immediate vicinity of Gallardo Peak, which rises out of the plain, with intervals north and south growing into mountain ranges in each of said directions, and which peak, if fanciful resemblances are to be indulged in, may very well also constitute the horn of a saddle, completed by the ranges either north or south.

Coming to the northwest corner, which, it will be recalled, the expediente places (R., 363) at a distance of 240 cords west from the north center monument and on a small hill (*cerro*), which is in front of the west center monument, Mr. Bonillas testifies that he located this monument (R., 16) by standing at the northeast corner, as located by him at College Peak, and looking toward the west in a direction at right angles to the course of the valley when two or three small hills can be seen near the foot of the Mule Mountains; going across the valley, which is 25 miles wide at this point, and searching the tops of the small hills, he found the northwest corner monument and

pile of stones upon one of them, and that these little hills, which are of limestone, are about a mile from the foot of the Mule Mountains in Arizona, and that there are no others to the north, or for a considerable distance to the south. Upon the location of this northwest corner there was an issue between the claimants and the Government, the contention of the Government being that this hill was one of a group lying west from the north center monument, as located by the Government, and being south of the international boundary line.

Mr. Bonillas then goes on to describe his location of the southwest corner of the grant, and also the southeast corner, which is described in the expediente as being (R., 363) at an estimated distance of 168 cords on the course to the east from the thicket of willows constituting the south center monument to the foot (falda) of the first pass which is to the right (or south) of the point where the east center monument was located, both the east center monument and the southeast corner being on a straight line at the foot (falda) of the Perillos Mountains. Bonillas located this southeast corner at what is known as the Ceniza Pass, which is situated in a northeasterly direction from the south center monument and in a southeasterly direction from the center monument. As to the location of this call there was no issue on the trial between the Government and the claimants, and this undisputed point in the survey forms the basis upon which it is believed it may be clearly demonstrated that the place adopted

by claimants as the location of their east center was really the correct location of the northeast corner of the grant, and that the east center of the grant was at a point about midway between the Gallardo Pass, the proper northeast corner, and the Ceniza Pass, the agreed southeast corner.

Mr. Bonillas's testimony, which up to this point had been the reading of his field report, thereupon reiterates (R., 17-19) that he could not find the north center monument at all; that the Ceniza Pass (R., 18), at which the southeast corner was placed, has a trail or bridle path going across it; that the old overland road passes just north of the east center monument as designated by him and through the Gallardo Pass, and that the map produced by him, introduced in evidence as plaintiff's Exhibit 1 (R., 24), correctly answers the description of the expediente in every particular to the notion of witness.

On cross-examination witness stated that he lived about 150 miles from the land in controversy and that his knowledge of it was derived from an investigation of it and other surveys made in that vicinity (R., 19); that the international boundary line is properly protracted on his map by triangulation, monument 82 in the Gallardo Peak being monument 19 on the old Emory survey of 1855. Witness testified that the course of the international boundary line was about east and west, and that his center monument at the Agua Prieta is a little over 3 miles, or about 18,000 feet south of the international boundary (R., 20), and

thus in excess of the 1 league or 100 cords stated in the expediente to be the distance from the center monument to the north center monument, 100 cords being about 2.6 miles (R., 21), and that the north center of the grant, if fixed by the distance named in the expediente, would fall south of the international boundary, whether measured in a direct line north and south or measured along the valley of the Agua Prieta (R., 21). Witness admitted (R., 21) that he did not attempt in this survey to make it conform to the measurement given in the expediente, and the reason he gave for this (R., 21) is that if he went just a league north from the Agua Prieta he would just about come in front of where the east center monument is located according to his survey. His inability to locate his north center according to courses and distances, so as to conform to his northeast corner, when it would entirely conform to the Government's northeast corner, if so located, is a very strong circumstance tending to disprove the accuracy of his survey. He further testified (R., 21) that the distance from his center monument to his north boundary line was about  $9\frac{1}{2}$  miles, as against 2.6 miles mentioned in the expediente; that the distance from his center to his south center monument is about 6 miles as against  $1\frac{1}{2}$  miles named in the expediente; that the distance from his center monument to his west center is about  $9\frac{1}{2}$  miles as against  $2\frac{1}{2}$  miles named in the expediente; that the distance from his center to his east center monument is about  $7\frac{1}{2}$  miles

as against  $4\frac{1}{2}$  miles named in the expediente; that his survey was made (R., 22) so as to take in the natural points given in the expediente "without regard to the distances;" and that the total area included in his survey is 163,797.48 acres against  $6\frac{1}{2}$  sitios or 28,199.66 acres named in the expediente, or a discrepancy between his survey and the quantity named in the original Mexican survey of 135,597.86 acres. Mr. Bonillas also testified that the center monument, as taken by him, was the pond of Agua Prieta itself, that natural object being about 100 feet wide by 150 feet long, and that his east center monument, which it will be recalled is in the immediate vicinity of what the Government contends constitutes the location of the original northeast corner, is distant 1,604.9 feet a little west of south from the international boundary monument No. 82, thus showing that if the Government's contention as to the location of the northeast corner of the grant at the Gallardo Pass is correct, such northeast corner is within Mexican territory.

On redirect examination Mr. Bonillas attempted to justify his excessive measurements in this case (R., 23) by testimony to the effect that in surveying similar grants in Sonora and Arizona, "of which he had surveyed a hundred if he had surveyed one," he had never found the courses and distances between natural monuments stated in the expediente to correspond with the actual distances as developed by him on his survey, but that the distances were all the way from double the distance to twenty times the distance, and that the



actual area was proportionately in excess of the area stated in the old title papers; that the notes of the old Spanish surveys had never been found by him to be scientifically and mathematically correct; that while the area in this case was said to be  $6\frac{1}{2}$  sitios, and it turns out to be  $37\frac{1}{2}$  sitios, he had found a great many discrepancies in other surveys, and in the Alamo de Sevilla, surveyed by him, and whose demasias had been confirmed by the Mexican Government to the claimants, he had included 28 sitios in a grant that was for 4 sitios. Mr. Bonillas testified (R., 24) that of the 163,797.48 acres which he included within his survey of the Agua Prieta tract, 95,267.43 acres are within the State of Sonora and the remaining 68,530.05 acres in the Territory of Arizona.

Walter E. Murphy, chief clerk in the surveyor-general's office of Arizona, was sworn by plaintiffs (R., 24) and identified an extract from the map of the topography of the survey of the international boundary line as made by Emory and Ylarregui in 1855, and which appears in the record opposite page 184. The purpose of the introduction of this map was evidently to show the location of the road from Santa Cruz running to San Bernardino north of Gallardo Pass in 1855. The history of that road, which was built by Lieutenant-Colonel Cooke on his famous march in 1846, will be pointed out hereafter.

Plaintiffs also introduced in evidence (R., 28, 186) a letter from Binger Hermann, Commissioner of the General Land Office, to the surveyor-general of Ari-

zona, showing that monument No. 82, on the present survey of the international boundary, is identical with No. 19 of the old Emory survey, and that the same is located to the northwest from a conspicuous landmark known as the Cerro Gallardo.

Plaintiffs also presented in evidence, under a stipulation giving them the same effect as though Oury were present and testified to their correctness, the field notes of the survey made of this Agua Prieta tract for claimants by F. W. Oury on October 1, 1892 (R., 186). These field notes are instructive in that they show a survey made on behalf of claimants differing radically from that relied on at the trial of the cause and made by Mr. Bonillas, also on behalf of claimants. Mr. Oury's survey locates the center of the grant at the Agua Prieta, which, as just observed, is a point well known and it is to be presumed is on Oury's map identical with the point selected by Bonillas as his center. Mr. Oury fixes the south center monument at a bunch of willow trees which are found in the middle of the valley, and which he describes as being the only trees of that description south of Agua Prieta for a considerable distance. The location of this south center on the Bonillas and Oury maps indicates that the two surveyors fixed this monument approximately at the same place. Continuing the comparison it would seem that if the statement made by Mr. Bonillas in his testimony (R., 17) that the identification of the monuments of the Agua Prieta grant are "perfectly established by his survey" is true, and if as stated by Mr.

Oury in his field notes (R., 189) he also, by his examination and survey, "established all the monuments of the Agua Prieta private land claim," the result would inevitably follow that these two surveys would be duplicates one of the other. It requires only a glance at the maps of the two surveys, however, to see the discrepancies between them, and to demonstrate that one or the other of these two eminent locators, both employed on behalf of the claimants, must have erred. Thus, starting from the south center monument, which, in the two surveys, as above stated, is apparently identical, Mr. Oury (R., 6) runs to the southwest corner of the grant on a course N.  $64^{\circ} 17'$  W., while Mr. Bonillas in running the same line takes the course N.  $89^{\circ} 52' 10''$  W. (R., 24, 25). Further, Mr. Oury reaches this southwest corner after going a distance of 85,839 feet from the south center, whereas Mr. Bonillas reaches the southwest corner after going only 39,053.3 feet. And yet Mr. Oury considers his location of the southwest corner as entirely satisfactory (R., 187), there being only one range of mountains, he says, in which occurs the peculiar red formation which fixes the southwest corner of the grant; and Mr. Bonillas, on the other hand, says that his monument (R., 17) "answers in every respect the recitals of the *testimonio*." When locators disagree in running the same line to the extent of 24 degrees in direction and 4,600 feet, or over 8 miles in length, who shall decide?

Following the survey, Mr. Oury places his west center monument on a course N.  $6^{\circ} 55'$  E. from his

southwest corner, and Mr. Bonillas fixes that monument on a course  $N. 36^{\circ} 13' 8'' W.$  from the southwest corner. Mr. Oury finds the distance from the southwest corner to the west center monument to be 11,958 feet, or about 2 miles; Mr. Bonillas finds the same distance to be 30,066 feet, or about 5 miles. Mr. Oury locates his west center monument (according to the scale of his map, which it will be observed is 2 miles to the inch and not 1 mile to the inch, as stated thereon), at a distance of about four-tenths of a mile from the international boundary. Mr. Bonillas locates his west center monument, according to the scale of his map (which it will be observed is 12,000 feet to the inch and not 6,000 feet to the inch, as thereon stated), at a distance of 5 miles from the international boundary. And yet Mr. Oury on the one hand says he found a monument of loose rock (R., 188) that answered "perfectly the description of the location of the west center of the claim and whose location on a red hill renders it comparatively easy of identification, as there are no other red hills in the vicinity." And Mr. Bonillas, on the other hand, locating the same monument found (R., 15) the position of the same to be described "with accuracy and clearness," and also found on the crest of a hill a *ceja* or eyebrow, in all respects according with the expediente, and also a large old monument, which he identifies as the west center monument even to the extent of its having a well-defined cross of stones at the foot of it. It is a commentary upon the ease with which piles of stones may be found with which to fit

expedientes that Mr. Oury was able to find what was undoubtedly the old monument at a point a half mile from the international boundary and Mr. Bonillas was able to find a monument equally the undoubted west center boundary of the grant at a point 5 miles from the international boundary.

Continuing from the west center monument, which should have been the same in each survey, if both were correct, Mr. Oury goes on a course N.  $36^{\circ} 49'$  E. to find his northwest corner. Mr. Bonillas goes on a course N.  $13^{\circ} 43' 13''$  W. to find the same northwest corner. Mr. Oury runs only 16,581 feet from the west center monument and finds the northwest corner. Mr. Bonillas goes over twice that distance, or 39,139 feet, to find that corner. And yet Mr. Oury (R., 88) found the northwest corner with entire satisfaction to himself, and Mr. Bonillas (R., 16) likewise found that corner to his satisfaction.

Coming to the north boundary of the grant, it needs no argument to show the wide discrepancy between the surveys made by these two surveyors acting on behalf of claimants. Mr. Oury (R., 187), searching up the valley, found as the north center of the claim, as called for in the expediente, a comparatively small monument of loose stones on the top of a very small hill, and his survey fixes this point as the north center, being at a distance of about 5 miles from the center monument at Agua Prieta. Mr. Bonillas, who seems to have searched farther up the valley, frankly admitted his inability to find any monument constituting the

north center (R., 17), and entirely ignored that call in making his survey and in platting the same. The result of this is that the point where Mr. Bonillas's north boundary intersects the valley is about  $9\frac{1}{2}$  miles against about 5 miles on Oury's survey, and 2.6 miles named in the expediente. The Oury north boundary consists of two broken lines, one running from the northwest corner to the north center corner upon a course S.  $85^{\circ} 17'$  E., with a length of 52,972 feet, and the second on a course from the north center monument to the northeast corner upon a course N.  $46^{\circ} 8'$  E., with a length of 60,100 feet; whereas the Bonillas map, ignoring the north center monument entirely, goes on a direct course from the northwest corner to the northeast corner of N.  $69^{\circ} 14' 10''$  E., with a length of 102,610 feet. The northeast corner and the east center monument of the grant on the Bonillas and Oury maps were evidently placed in the same general vicinity. It is evident, however, that they were not placed at exactly the same point; otherwise it is difficult to account for the discrepancy between the course from the northeast corner to the east center corner in the Oury map, which is S.  $4^{\circ} 9'$  E., and the course on the Bonillas map between the same points, which is S.  $3^{\circ} 55'$  E., or likewise to account for the difference in distance, the distance on the Oury map being 51,120 feet and that on the Bonillas map being 50,338 feet, or a difference of one-seventh of a mile. As noticeable is the difference in the location of the southeast corner of the grant. While this is in all

probability in the immediate vicinity of the Puerto de la Ceniza, as heretofore stated, it is difficult to understand the difference between its location as laid down by Mr. Bonillas and that laid down by Mr. Oury, except on the ground that the pile of stones which Mr. Bonillas so confidently asserts to be the proper corner is not the correct corner; or, on the other hand, that the pile of stones which Mr. Oury identifies as the southeast corner is not the southeast corner; and that perhaps, after all, the proper southeast corner is not at either of the piles of stones identified with such certainty by the two eminent surveyors, miles apart from each other, but is at some other point in the same general vicinity. Thus the southeast corner on the Oury survey is S.  $13^{\circ} 54'$  W. from his east center monument, while on the Bonillas map it is S.  $5^{\circ} 26' 45''$  E. from the latter's east center monument. On the Oury map the southeast corner is distant 22,165 feet from the east center, whereas on the Bonillas map it is distant 30,765.8 feet, a difference of over a mile. Likewise the course on the Oury map from the southeast corner to the south center monument, which, as has been seen above, is approximately at the same place, is S.  $46^{\circ} 10'$  W., whereas on the Bonillas map it is S.  $63^{\circ} 42' 15''$  W.; and the distance from the southeast corner to the south center monument on the Oury is 39,116 feet, against a distance of 40,411 feet on the Bonillas map. These figures demonstrate absolutely that the southeast corner of these two surveys is not at the same place. Yet, Mr. Oury in his field notes (R.,

188) says that in the old monument of loose stones which he found at the first pass or divide after leaving Gallardo he fixed a point "accurately answering the location called for in the expediente" and accepted it as the southeast corner of the claim; and Mr. Bonillas, with equal certainty, states that he readily found the southeast corner in the Ceniza Pass at the point named by him (R., 17). It may here be remarked that Mr. Oury does not in his field notes pretend to have located his southeast corner at the Ceniza Pass, as was done by Mr. Bonillas, but says that he located it at the first pass going south from Gallardo Peak, the point at which he had placed the east center of the claim (R., 188). As contended for by the Government, and contested by claimants on the trial, there is a pass intermediate between Gallardo and this Ceniza Pass called the Puerto de la Misa. The center of this pass, as shown by the testimony of Mr. Tipton on the trial (R., 67), is about N. 87° E. from the center monument at the Agua Prieta, and the point X on plaintiffs' Exhibit 1, which is the west entrance of that pass, is a little south of east of the center monument, as will be seen by an inspection of plaintiffs' Exhibit 1. It is worthy of note that the southeast corner fixed by Mr. Oury is also but slightly south of east from the center monument, and his statement that it is located at the first pass southward from Gallardo, taken in connection with the course upon which it lies from the center monument, indicates that he located his southeast corner not at the Puerto de la Ceniza, but at the Puerto de la Misa.



Had he located it at the former point, his course would have been that shown by Mr. Bonillas's survey, since his monument would have been at practically the same point. While the Government does not concur in the view adopted by Mr. Oury, that the southeast corner was located at Puerto de la Misa, but contends on the other hand that the *east center* monument was there located, this action of Mr. Oury in placing the southeast corner at the first pass south of Gallardo, and in placing that pass almost due east of the center monument, the exact location of the Misa Pass, as shown by the Government's testimony, is strongly corroborative of the testimony for the Government to the effect that there is a pass at this point going through the Perrillo or Ceniza mountains from west to east. The importance of the existence of this pass in determining the boundaries of this grant will be discussed hereafter.

A final comment to be made upon the survey of Oury as compared with that of Bonillas is that, while Mr. Oury finds only 43,499 acres of this grant within the United States (R., 190), Mr. Bonillas, equally certain, finds 68,530.05 acres within the United States. This slight discrepancy of 25,000 acres between two surveys of the same tract, each made by a surveyor who says his survey is correct, is impressive in showing the absolute unreliability which must surround the attempt to locate a grant guided mainly by loose piles of stones. It also demonstrates with clearness the ease with which excessive areas may be included in these

Arizona surveys when once the surveyor has determined to discard the area, distances, and other guides afforded by the expediente as so much meaningless surplusage.

On behalf of the United States the testimony of Mr. Henry O. Flipper was presented. Mr. Flipper testified (R., 29) as to his having been a civil engineer since 1877, having been familiar with surveying in the Republic of Mexico from 1882 to 1893, as to his familiarity with the Spanish language and with the *expedientes*, Spanish documents, and records of the Republic of Mexico, and as to his having surveyed public and private properties in the Republic of Mexico in connection with the *titulos* and *expedientes* on which they were based. He further testified to his having been on the Agua Prieta grant with Special Agent W. M. Tipton and Assistant United States Attorney William H. Pope during the month of April preceding the trial, and to his also having been there in 1886, when he had crossed the grant (R., 30). He described the Agua Prieta lake, which is the center monument of this grant (R., 31), as being about 250 by 150 feet in width, with a pile of stones about 66 feet from the lake. He testified that from this monument of stones at Agua Prieta to monument No. 86 on the international boundary line is 4.04 miles upon a course N. 29° 35' W. true, and that the distance from the Agua Prieta monument due north to the international boundary line is 3.50 miles (R., 31); and that a line run due north 100 cords from the Agua Prieta—that being the

distance mentioned in the expediente—would end nine-tenths of a mile south of the international boundary line; and that a parallelogram having the measurements named in the *expediente* north, south, east, and west from the Agua Prieta as a center would fall entirely south of the international boundary line.

Mr. Flipper also testified that he made a search for the object given in the expediente as the north center of the grant and found such a monument, it being a pile of stones measuring 70 inches from east to west and 60 inches from north to south, about a foot high, and standing on the summit of a *lomita* on the east side of the valley of the river and at a distance south of the international boundary line of 0.54 mile, and at a distance practically due north from the Agua Prieta of 2.96 miles. (R., 33.) He testified that a line from the monument at Agua Prieta in the direction of the north center monument just referred to and measuring 100 cords, the distance stated in the expediente, would not reach this north center monument, and that a parallelogram built upon such a line running toward the north center monument, said parallelogram having the measurements south, east, and west from the center, stated in the expediente, would be entirely within Mexico. Mr. Flipper testified that he had with him at the time he examined this grant in the field a copy of the original *expediente* of the Agua Prieta grant, and also a copy of the *expediente* of the denouncement of the *demasias* of this grant made before the district court at Guaymas by the Messrs.

Camou and tendered in evidence as defendant's Exhibit A, wherein the limits of the grant were defined by a survey under the Mexican Government, and that said survey was made by one Florencio Rosas, who succeeded in locating what he (Rosas) considered the north center monument of the original survey. Mr. Flipper testified that he identified the natural object called Gallardo Hill (R., 34), the same being south of the international monument No. 82, and said monument being near the foot of the north slope of said Gallardo Hill. He further testified that he found the course from the north center, as identified by him, to the summit of Gallardo Peak to be N.  $79^{\circ} 3'$  E. magnetic, which is the course given by Mr. Rosas in his survey of the demasias of the tract from his north center to the same peak; and that in the survey made by one Francisco Dublé, under the Mexican Government, of the north boundary of the Agua Prieta grant, the course from the *lomita* selected by him (Dublé) as the north center to Gallardo Peak is also N.  $79^{\circ}$  E.; and that the result of this examination was to identify the monument found by Mr. Tipton and witness as the same monument located by Mr. Rosas and also by Mr. Dublé as the north center monument of the Agua Prieta grant (R., 35). The location of the *lomita* found by Mr. Flipper and Mr. Tipton is indicated on a plat which he identifies as correct (R., 35), and which appears in evidence as defendant's Exhibit E (R., 336). The identity of this point with that fixed by Rosas and Dublé will also appear from a reference to the maps of

their respective surveys (R., 210, 252). Mr. Flipper testified that the north center monument, as identified by Rosas, Dublé, and himself is probably a quarter of a mile east from the river, and is also east of the road going up and down the valley.

He also testified that the Rosas and Dublé north center is located on a natural object conforming to the expediente, that is, on the summit of a very small hillock (*lomita muy pequenita*), and that there is also a pass almost due east therefrom, running immediately north of the Gallardo hill or peak, and another pass immediately south of the Gallardo Peak; that this north center is not directly opposite College Peak as indicated by Bonillas's map, but that College Peak bears N.  $29^{\circ} 2'$  E. therefrom, and as to whether it was in front of said peak would depend in the meaning of the words "in front of," it being hard to tell what is the front of a mountain (R., 36-37).

Mr. Flipper testified that he went to the pass or *puerto* on the north side of Gallardo Peak, and in which international monument No. 82 is located, and that the wagon road going through that pass has evidently not been used for some time, there being a fence across it, but that on the south side of Cerro Gallardo there is also a pass through which goes a good wagon road over which he had driven, and that he, from information obtained from people in that country, had learned that the pass south of the Cerro Gallardo was known as the Gallardo Pass, and that it is through this pass that the main wagon road from San Bernardino westward now runs. He further testified that he knew

the point delineated in Mr. Rosas's survey (R., 210) as the Puerto de la Silla, and that *puerto de la silla* means saddle pass, the word *silla* meaning primarily a chair, and saddle being its derivative meaning, and that said Puerto de la Silla is the same pass described by witness as the Gallardo Pass. He testified (R., 38) that this Cerro Gallardo stands practically alone, and toward the north, the pass intervening, there is the beginning of the Swisshelm Mountains, which continue thence northward, and that toward the south there is a range of mountains known as the Perrillo, which is separated from the Gallardo Peak by a series of hills more or less detached from the main range; that the Perrillo Mountains run from northeast to southwest, and the Swisshelm run practically the same direction, but more nearly from north to south than the Perrillo Mountains; and that the Perrillo Mountains lie south of west from the Cerro Gallardo, at a distance of about a mile and a half or two miles. Witness further testified that he went to the end of the Perrillo Mountains, where he found the Puerto de la Ceniza located practically as laid down on the Bonillas map; and that he went through said pass and found evidences of a wagon road which had been washed out and was not then passable (R., 39); and that coming northward toward the Cerro Gallardo and between the pass immediately south of the Cerro Gallardo, to which he had already testified, and at a distance of about 2 or 2½ miles south of the Cerro Gallardo there is found another pass, known as the Puerto

de la Misa, through which is evidently a much-used road, and that he had camped on a point in this pass known as the Agua de la Misa, at which there was water, there being no water, from what he could learn, between that and the Cerro Gallardo, or indeed at the latter point, and there being no evidences of any in the Ceniza Pass (R., 39). Just at this point the attention of the court may be recalled to the fact that the *expediente* places the southeast corner of this grant at the pass next south of the east center monument; or, stating the proposition in another way, there is no pass between the east center of the grant and the southeast corner. The importance of Mr. Flipper's testimony as to the existence of this Misa pass, as well as the other testimony in the record on the same subject, lies in the fact that such testimony renders it a physical impossibility, under the *expediente*, that the east center monument of the grant could have been as placed by Bonillas, for the reason that to so place it would be to leave intervening between the east center monument and the southeast corner one and perhaps two passes, when the *expediente* says that the southeast corner is at the pass next south of the east center monument.

Continuing his description of this Puerto de la Misa, Mr. Flipper testified that he went to this pass from the eastern side on a wagon road as far as the water hole, from which water hole there is a wagon road going south to the Puerto de la Ceniza, and another road going into the valley of the Agua Prieta southeasterly to the headquarters ranch of Mr. Camou at Cabuyona,

and on to the town of Fronteras; that wagons have also gone over this road to the Agua Prieta pond (R., 40), and that the Misa Pass is an excellent place for a wagon road, there being no obstacles of any kind, the pass being open and of such ease of access as to justify its being considered a narrow valley instead of a pass.

Coming to the matter of a road from Santa Cruz to San Bernardino, which plaintiffs' testimony indicated passed on the north of Gallardo Peak, Mr. Flipper testified (R., 40) that this road was built by Lieutenant-Colonel Cooke, who was sent out by the Secretary of War to build a road in the years 1851 and 1852, or possibly earlier, which fact he knew by reading. On objection to this line of testimony the Government produced in evidence the diary of Lieutenant-Colonel Cooke, together with a sketch of part of his march and wagon road, as defendant's Exhibits A-1 and A-2 (R., 337-339), and also extracts from the report of the Mexican boundary survey as defendant's Exhibit A-3 (R., 340). It seems proper at this point to call the attention of the court to the fact that the sketch introduced as defendant's Exhibit A-2 shows the course of Lieutenant-Colonel Cooke's march and wagon road to be along the line shown as the old overland road on the Bonillas map, and that his report (R., 338) shows that such road was constructed by him by cutting his way "through dense thickets of mesquite and many other varieties of bushes, all excessively thorny;" and that in writing the governor of Sonora on December 18, 1846 (R., 339), he speaks of the fact that he was



making a wagon road "from the streams of the Atlantic to the Pacific Ocean, through the valuable plains and mountains rich with mineral of Sonora;" and that in the report of William H. Emory as to the boundary survey, presented as defendant's Exhibit A-3 (R., 340), the route taken by Colonel Cooke in 1846 is referred to.

Mr. Flipper also testified that there was a road from Santa Cruz to San Bernardino by way of Fronteras, and that Fronteras was in olden times a presidio, or garrison, for soldiers (R., 40), and that in olden times, so far as his information went, there was no other presidio between Santa Cruz and San Bernardino, or located that far north; and that the country north of Fronteras was, in olden times, overrun by Indians, as stated in the title papers. He also testified that the Spanish word *puerto* means a pass or a door, and that both the Puerto Gallardo and the Puerto de la Misa, testified to by him, were *puertos* within his idea of the definition of the Spanish word (R., 41). He also testified that in the vicinity of the Puerto de la Silla, as located on the expedientes from Guaymas, introduced as defendant's Exhibits A and B, which, it will be recalled, is at Gallardo Pass, there are both large *lomas* and small *lomas*, which are near higher *lomas*, and that there are quite a number of *lomas* on both sides of said pass (R., 41). The relevancy of this testimony will be noted, in view of the recitals of the expediente that the northeast monument of the grant was ordered placed near Saddle Pass on a small hillock

(*loma*) which is to the right and near two others that are higher. This testimony of Mr. Flipper shows that these natural objects are present in the immediate vicinity of the Puerto de la Silla, as located by Mr. Rosas in his Mexican survey, and which, in the view of the Government, is the northeast corner of the grant now under consideration. Mr. Flipper also testified that he found a monument on the summit of a large *loma* close to the Cerro Gallardo and between two passes running respectively north and south of that cerro (R., 41), and that a line run eastward to that *loma* or to other *lomas* on the west side of Cerro Gallardo from the north center monument, as identified by him, would fall entirely in Mexico, and that a straight line running from the north center monument, as located by Mr. Rosas on his survey to the northeast corner, as located by Rosas, would also lie entirely within the Republic of Mexico (R., 41).

He also testified that in the vicinity of the Misa Pass and at its western opening and to the left thereof, as one enters from the west, there are a number of *lomas* situate at and near the foot (*falda*) of the range. The relevancy of this testimony will also be seen by a reference to the *expediente* (R., 41), from which it appears that the parties were ordered to place the monument on the east center of the grant on a high hillock (*loma*), which is to the right of the pass where the old road passes from Santa Cruz to San Bernardino; this testimony showing that the natural objects (*lomas*) called for by the *expediente* exist in abundance at the entrance

of this Misa Pass, through which it is contended by the Government the old road mentioned in the expediente ran.

Testifying as to the northwest corner of the grant, Mr. Flipper testified (R., 42) that the Naidenibacachi Mountains constitute the natural west wall of this grant, and that looking from the north center monument of the grant, as identified by Mr. Rosas, due west, a number of small *cerritos* come into the range of vision, and that setting the instrument on the Cerro Gallardo, which is the northeast corner of the Rosas's survey, and turning the instrument over on a continuation of the same course west, there is found a small *cerrito* at the north end of the range; that this *cerrito* lies in Mexico, so that a line run from the north center monument to this *cerrito* would lie wholly in Mexico. Concluding his direct examination, Mr. Flipper testified (R., 43) that based upon his examination the *loma* identified by Mr. Rosas was, in the opinion of witness, the north center monument of the grant; that the Puerto de Gallardo was what was known at the time of the grant as the Puerto de la Silla, and constituted the northeast corner of the grant; that the *cerro pequenito* just mentioned was the northwest corner, and that these three points fixed the north line of the grant, and that such line would be in Mexico, and consequently the whole of the grant was in Mexico.

On cross-examination Mr. Flipper testified that the Agua Prieta and Los Sauces or clump of willows were correctly designated on the Bonillas map (R., 44);

that the Agua Prieta according to his map was 3.50 miles south of the international boundary line, and according to Bonillas's map was 3.46 miles south of the international boundary line; that the old ruins of San Bernardino were about one-fourth of a mile south of the international line; and that Santa Cruz is about 7 miles south of the international boundary line. Being shown a tracing of the international boundary line, contained in the record as plaintiffs' Exhibit R (R., 185), he testified that there were several high hills on the right of the pass through which goes the old road from Santa Cruz to San Bernardino, as shown on said map, but that said map does not correctly represent the topography out there; but that there is a high hillock to the right of said road and said hillock, which is distinct from Gallardo Peak, is correctly represented on the Bonilla's map. Witness stated that he did not go to the west center as identified by Mr. Bonillas, or to the southwest corner, but that he did go to the southeast corner and found the pass at which it is located; that he visited the Perrillo Mountains, which are on the same range with the Swisshelm Mountains, being the names of merely sections of said mountains. Witness stated that he did not go to the northeast corner of the Bonillas survey at College Peak. He called attention to the fact that while on the map introduced in evidence as a part of defendant's Exhibit A the *lomita* identified as the north boundary is apparently at the international boundary line, it is in reality fifty-four hundredths of

a mile south of it, the difference between the facts and the appearance on the map being due to the very small scale on which it was drawn (R., 47), and that while there are hillocks all along the river on both sides of its length, this was the only one he found going northward from the center monument with a monument on its summit. He testified that the town of Fronteras was probably 35 miles from the international boundary line; also that the approximate distance between the Cerro Gallardo and the Misa Pass is between 2 and  $2\frac{1}{2}$  miles (R., 48), and that the Rosas map introduced in evidence as defendant's Exhibit A (R., 210) purports to locate four of the monuments according to the original *expediente*, to wit, the north center, the northeast, the south center, and the southeast monuments. Referring again to the Bonillas map, Mr. Flipper testified that in the vicinity of the northwest corner, adopted by Bonillas, there was a small hill, but as to whether there was any monument upon it he did not know, not having been to it; but that he had been to the south center monument (R., 49), and that it was correctly designated on both of the maps (apparently meaning the Bonillas and Rosas maps); that he did not find the pile of stones alleged to be at the southeast corner of the Puerto de la Ceniza, although he had hunted diligently for it, going from the east to the west side of the Ceniza Pass, following the trail of an old wagon road. Witness also testified that there is a high hill or *loma* south of the pass just north of Gallardo Peak, on said *loma* there being two large

monuments or piles of stones on a line nearly north and south, and that there were higher hills to the north of this *loma alta*, although not immediately close to it; that both of these monuments appear to be recent (R., 49-50), and that as to whether there was a pile of stones with a cross upon said hill (a circumstance upon which Bonillas laid some stress), witness testified that that pile of stones might be called "a cross or crescent or a , according to one's imagination," and that this *loma alta* is correctly located on the Bonillas map. Witness stated that he did not know whether there were any passes in the mountain between this *loma alta* and College Peak, as located by Mr. Bonillas; that the east center monument of this survey is near the mouth of the Puerto de la Misa, which should be located on the Bonillas map something like 2 miles south of the west entrance of the Puerto de Gallardo; that the east center when properly located would be 2 or  $2\frac{1}{2}$  miles south of the Bonillas east center, and that the southeast corner of the grant would be about where Bonillas has it (R., 50). Witness denied that he had stated that there were not two other higher peaks near the east cruz monument as located by Bonillas, but on the contrary asserted that west of it there are several other higher peaks, although not immediately near it. He further testified that he had been through this Perrillo chain from east to west, starting from the Cerro Gallardo on his first trip, and subsequently going to the eastern foot of the Puerto de la Misa in a carriage, and then across

on foot to the Puerto de la Ceniza; that he went through the Ceniza Mountains from San Bernardino down to Agua Prieta in a carriage entirely across the range from one side to the other, and that this trip was taken through the Puerto de la Misa (R., 51); that there is a road on the west of the Perillo Mountains coming east through the Misa Pass, and it is a very good road and as plain a road as one could get, and that so far from the country being precipitous in character, this road is as good a road as one could find (R., 52); and that this road joins another road at Gallardo Pass, and then goes on to San Bernardino. Witness reiterated his belief that the point taken by Rosas as the north center monument was the north center, because it agrees with the description in the original title papers, and that such belief is based on the theory that the point described by Bonillas as the east center monument is in fact the northeast corner monument; and he stated that the correctness of his survey is dependent upon this basis. On redirect examination, referring to Cooke's road hereinbefore mentioned, Mr. Flipper testified that upon inquiries made from people living in that country, upon his first visit in 1886, he was told that that road went through Gallardo Pass and had been opened by Lieutenant-Colonel Cooke prior to the treaty, and that it was used afterwards by emigrants going to California, and that that road is the same road as the old road laid down by Bonillas. He also testified that the lomas that were near to the other lomas at and

about Gallardo Pass are about a mile distant therefrom, and that there were also some small lomas in that vicinity and also numerous lomas other than this one on which was found this pile of stones (R., 54); that his identification of the Los Saucer as the proper south boundary of the grant was based, not upon an examination with that question in view, but simply upon a general idea derived in surveying in that vicinity in 1886, when he had occasion to follow the boundaries laid down in the expediente and claimed by the then owners, and when he followed the location of the north boundary laid down by Mr. Rosas. (R., 54.) Referring again to the range of hills seen from the north center monument of the grant, and in which is located the northwest corner of the grant, he testified that this range of hills was entirely south of the international boundary line and was southeasterly from the Mule Mountains. Referring to the wagon road emerging from the Misa Pass and going westward to Fronteras, he testified that said road had the appearance of being well traveled recently, and that on the east side of the Perilló Mountains there is a road from the Puerto de la Misa to the Puerto de la Ceniza. Witness further testified that the pass north of Gallardo Peak is a separate door or pass in the mountain from that south of the peak, and that the Puerto de la Misa is also entirely separate from them, cutting the range of mountains 2 or  $2\frac{1}{2}$  miles from them and at a point about the center of the range of mountains as laid down by Bonillas on his map. Mr. Flipper testified that from the Agua Prieta



the center point of the west entrance of the Puerta de la Misa bears N.  $87^{\circ} 33'$  E. magnetic, thus lacking about 2 degrees of being true east; that the surface of the grant in the vicinity of the Cerro Gallardo is very rocky, there being loose rock all over the grant in that vicinity in great abundance everywhere (R., 57), a fact throwing some light on the readiness with which Bonillas was able to find piles of stone there.

On further cross-examination, in answer to the question of whether witness had made any inquiries of Mr. Eduardo Camou, one of the witnesses for the plaintiffs, and the manager of the ranch near Agua Prieta, upon his visit there in April, 1899, as to the road from Santa Cruz to San Bernardino; Mr. Flipper replied that he had asked Mr. Camou if he could point out the natural objects of this grant, but was told by him that he did not know any of them, but that his *mayordomo*, Jose Montaño did, and thereupon he, Montaño, came and went with witness and showed the natural objects, as Camou's father had an interest in the grant; but that Eduardo Camou did not point out anything. (R., 58.) Witness, concluding his recross-examination, testified that the hill upon which Bonillas located his east center monument was not a *loma pequeñita*, the designation used in the title papers for the northeast corner of the grant, but that there is in that vicinity quite a number of *lomas pequeñitas*. Witness further testified that a road from Santa Cruz to San Bernardino, passing as indicated by Mr. Bonillas on his map, would not go through the first pass to the north of the Puerto de la

Ceniza, but, on the contrary, would come through the third pass north thereof, there being, as will be recalled from the testimony, two passes intervening, one immediately south of Gallardo, and the other the Misa Pass.

William M. Tipton, being sworn on behalf of the Government, testified as to his being special agent of the Court of Private Land Claims, and to his experience in land surveying (R., 59, 60), and to his having visited the Agua Prieta grant in company with Mr. Flipper and the assistant United States attorney, Mr. Wm. H. Pope, in the month of April, 1899; that he assisted Mr. Flipper in making the measurements to which the latter testified on the stand, and that said measurements are correct; that he went with Mr. Flipper to the point to which the latter testified as being the north center monument of the grant, and that said monument was at a point a very little over half a mile from the international boundary line. (R., 60.) Describing this monument, Mr. Tipton spoke of it as not being over a foot or 15 inches in height and measuring 70 inches across one direction and 60 inches on the other, and having evidences of having existed for a considerable time, said monument being located on the top of a small hill in the valley of the Agua Prieta and on the east side of what might be called the Agua Prieta River and about one-fourth of a mile distant therefrom. Mr. Tipton testified that the north center monument is more than 100 cords from the Agua Prieta, being very nearly north thereof, and that a parallelogram laid off, having as its north side an east and west line

running through a point 100 cords true north of the Agua Prieta would lie entirely within the Republic of Mexico, and that a parallelogram having its north side running east and west through a point 100 cords from the Agua Prieta and on a course to the north center monument, as identified by Mr. Flipper, would also lie entirely within the Republic of Mexico. He also testified that he took an observation of the course from the north center monument, as described by Mr. Flipper, to what is known as the Gallardo cerro or peak, and found such course to agree with that given by Mr. Rosas in his Mexican survey, thus identifying the north center monument identified by Mr. Rosas with that identified by Messrs. Flipper and Tipton (R., 62); and that looking westward from said north center monument, after crossing the flat portion of the valley of the Agua Prieta, there are some hills forming the first bench, which extend for 5 or more miles without increasing much in height, and beyond that toward the international boundary line there is a range of hills which appears to be separated from what is called the Naidenibacachi Mountains by a pass. Said range runs toward the international boundary line, but terminates a short distance south thereof. At the end of this range and south of the international boundary line there are a number of *cerritos*, or small hills (R., 62), and on a course S. 79° 3' W., magnetic, from the north center monument, being the reverse of the course taken to the monument on the Gallardo Peak, there is found one of these hills;

that the Mule Mountains lie a little to the north and west of these *cerritos* or hills, with open country intervening, and that looking from the north center monument the north end of these hills are almost directly west, and form horizon in that direction. Mr. Tipton testified further, that looking directly east from the center monument the Ceniza mountain range formed the horizon in that direction. From said center are visible two breaks in this Ceniza mountain range, one of them toward the north end of the range, known as the Puerto de la Misa, and the other farther south, known as the Puerto de la Ceniza (R., 63); to both of which points, as well as to the Cerro Gallardo, witness went (R., 64). He further testified that this Cerro Gallardo is south of the international boundary line, and that there is a puerto or pass to the north, in which the international monument 82 is located; that he made an attempt to go through this pass with a vehicle, in company with Mr. Flipper, but found access extremely difficult, the road being obstructed by a wire fence in which there was no gate, and which stopped them from going farther east; that there is another puerto or pass southwest from the pass just mentioned and on the south side of Gallardo hill or peak, through which there is a wagon road and through which witness went twice in a vehicle, the road through that pass being a very good, well-traveled road. Witness also testified that the next pass toward the south, the Puerto de la Misa, was visited twice by him; that he spent a night there in camp, and also the next day, there being there two

water holes in said pass; that witness ascertained the water to be called the Agua de la Misa, and the name of the pass to be the Puerto de la Misa; that this was ascertained upon inquiry of different parties, as to locality, among others of Jesus Montaña, the foreman at Camou's Cabuyona ranch in that section. Witness further testified that there is a wagon road through this pass and that said pass is between 2 and 3 miles on a straight line from the Cerro Gallardo; that he went from the Cerro Gallardo to this pass over a wagon road, that route being from one-half to three-quarters of a mile farther than on a straight line; that he went over the road through the Misa Pass once entirely from one side of the mountains to the other, and the second time he went from the east side as far as the Agua de la Misa over the wagon road running from said water hole to the east side, so that he went entirely through the pass once and practically one-half way through it again (R., 65); that the wagon road is a very good one, and there are few if any places upon it that are steep, and so excellent is this road that the first drive took only three-fourths of an hour to drive from the south base of the Cerro Gallardo to the Agua de la Misa; that at its eastern end the road joins the road passing through Gallardo Pass in the direction of San Bernardino, and at its western end the road has the appearance of being well traveled going in the direction of Cabuyona, and there is also a trail from the western end toward what is called Sulphur Spring, a trail evidently used by horses and upon which there

are wagon tracks; that on the east side there is also a wagon road running south from the Agua de la Misa along the line of the mountains to what is known as the Ceniza Pass, but which is not so well traveled as the one coming clear across the mountain toward Cabuyona; that this road through the Misa Pass joins the road going through the Gallardo Pass at what might be called the west end of the Gallardo Pass, and after one gets through that Gallardo Pass going east there is another road coming in west of the Mescal factory (R., 66). Witness testified that he went to the Ceniza Pass, which in his judgment is 5 or 7 miles from the Cerro Gallardo; that he went into it in a westerly direction along the road coming from the Puerto de la Misa, a mile and a half or more, and found evidences of travel in the shape of an old road through the pass and several trails on both sides of the pass. (R., 67.) Witness took an observation from the Agua Prieta, or center monument to what appeared to be about the center of the Puerto de la Misa, being about N.  $87^{\circ}$  E., the exact course being shown by Mr. Flipper's notes that Gallardo Peak is a little north and east of the Ceniza Mountains, as laid down on the Bonillas map, and is disconnected therewith, there intervening some foothills, the main range running off toward the southwest, and said Cerro Gallardo being separated from the mountains to the north and the foothills appurtenant to said mountains by a pass which is located at international monument 82.

On cross-examination Mr. Tipton testified that the sources from which he received information as to the

locality were Montaña, the man furnished by Mr. Camou, and another cowboy, whose name witness did not know; that Mr. Eduardo Camou was asked in his presence in regard to the tract generally and stated "that he was not well acquainted with the names of places in that vicinity, but would send us a man who was." (R., 68.) It may be here noted that Mr. Camou was subsequently sworn on the trial of the cause both to testify as to his knowledge of the locality and to the lack of knowledge of the locality by Montaña, and this in spite of the fact that he had stated at the time of the investigation in the field, as just noted from Mr. Tipton's testimony, that he was *not* acquainted with the locality, but would send Montaña, whom he represented to be well acquainted with it. Mr. Tipton further testified that he had not been to the northwest corner indicated on the Bonillas map, and did not know whether there was a small hill at that point or not, nor had he been to the west center monument or southwest corner of the Bonillas survey, nor had he been to the south center monument at the willows, although he had been in the immediate vicinity thereof; that he was at the Ceniza Pass, but did not there find the monument to which Bonillas referred, and that he had found near the Gallardo Peak evidences of an old road, in going along which witness was stopped by a wire fence (R., 89); that witness did not see the east center monument adopted by Bonillas, and that the high hill on which it is alleged to have been placed was, in his opinion, a sort of spur of the

Gallardo Peak, running off to the west, the international monument not being on the slope of this hill, but on that of the Gallardo hill proper (R., 69), and Mr. Bonillas's map did not, in his opinion, correctly represent the location of the Gallardo Peak (R., 69).

There was also tendered in evidence on behalf of the Government (R., 69) an extract from the report of Lieut. P. St. George Cooke of his march from Santa Fe, N. Mex., to San Diego, Upper California, with map thereof (R., 69-70, 337-340), to which reference has already been made, and also extracts from the United States and Mexico survey by Major Emory (R., 70, 340), to which reference has also been made; also (R., 70, 340), a portion of the plat of the international boundary line, being a continuance eastward of the section of this plat, introduced by plaintiffs as Exhibit R, said plat introduced by the Government being defendants' Exhibit A-4.

In rebuttal claimants recalled Ignacio Bonillas, who made the survey upon which they relied, and who testified (R., 70) again to his acquaintance with the country in the neighborhood of the Agua Prieta and east of the Ceniza or Perrillo Mountains and in that vicinity to the south of the Cerro Gallardo. He testified that for about 2 miles south of the Gallardo Peak there is a series of low hills, there being some high topped hills to the southwest; that witness had never in his investigation heard of the pass called Misa Pass, and that the pass termed by the witness for the Government (R., 71) the Misa Pass is not, in his opinion, a separate



pass from the Gallardo Pass, "because it is not a pass that goes from the southeastern side." Being asked if there was a separate pass between the north end of the Ceniza Mountains and the Ceniza Pass, witness answered "Not that I know of; not that I consider a separate pass from the Gallardo." He testified that the roads immediately north and south of Gallardo Peak are practically the same road, being simply detours around that peak and meeting again at a point not over a half mile east of the Gallardo Mountain, whence they follow into the San Bernardino Valley (R., 71); that there has never been until very recent times a wagon road through the pass termed by Government witnesses the Misa Pass, and that there is not now and never has been a wagon road through the pass described as the Puerto de la Ceniza (R., 72), but that you can go to the San Bernardino Valley across the Ceniza Pass, and to the east; that people living to the east of the Perrillo Mountains and from 5 to 10 miles south of the international line go to the west thereof by way of San Bernardino through the Gallardo Pass, and that if there were a wagon road through the Ceniza Pass or the Misa Pass it would be used by them, since it would save perhaps 10 or 20 miles. Witness was asked this question:

Q. I will ask you this question: Is there any traveled wagon road south of the road south of the Gallardo Peak, between that and the Ceniza Pass?

To which he replied:

A. No wagon road.

This question and reply can be accounted for only on the theory of the willingness of the witness to testify to any state of fact, either true or false, necessary to support his survey, it being in the face of the physical fact absolutely beyond controversy, as established by the testimony of Messrs. Flipper and Tipton, and attested by the experience of the writer, that there is such a road, and one over which the persons representing the Government had, within six weeks before the trial, traveled repeatedly in a vehicle.

On cross-examination (R., 73) witness apparently modified this misrepresentation of the physical facts by stating that there is no traveled road running from the Agua Prieta to the San Bernardino Valley "that I know of, through the Puerto de la Misa." He admits, however, in the same breath (R., 73), that there is a horse trail upon which parties can go on horseback and upon which he had gone repeatedly, said trail having been used in connection with the distillery, years prior to 1895, to bring wood and other material from whatever part of the Ceniza Mountains they could find it, and from both sides or both slopes of the mountains, and that this road constituted an avenue through which they could secure material for this distillery from the west slope of said Ceniza Mountains. In view of the fact that this distillery is on the east side of the mountains, and this trail or road through the Ceniza Pass was, years ago, used to bring material thereto from the west side of the mountains, it would seem to come clearly within the definition of a mountain pass, which, as given by Mr. Bonillas (R., 75), is a

"depression in the mountain chain through which you can go, maybe, with vehicle or horseback."

Witness further admitted on cross-examination (R., 74) that there is a road going out from the Puerto de la Misa to the Agua Prieta Valley, and that one can go through that depression and then go north to the Agua Prieta Pass to the east "without going through the Gallardo Pass." Being asked if, as a matter of fact, there is a pass in the Ceniza Mountains, right in the middle of them (R., 74), witness said that he did not think so; that his idea was that that pass is the same as the Gallardo Pass, and that he never knew a wagon road to go from the Puerto de la Misa to Fronteras, but that such a pass as the Misa Pass would afford a shorter method of going from Fronteras to San Bernardino than the Gallardo Pass (R., 75); that the old overland road marked on his map runs over the north end of the Ceniza Mountains, entering the Puerto de Gallardo or Gallardo Pass perhaps 2 miles west of the Gallardo Mountains (R., 77); that the distillery (to which, it will be recalled, witness had already testified this trail through the Puerto de la Misa was tributary) was abandoned in the early nineties (R., 77), thus showing that said trail was of considerable age.

John H. Slaughter, being sworn on behalf of claimants, testified that he had lived in Cochise County since 1879 and knew the Ceniza Mountains and also the Gallardo Peak (R., 78), and that people in going from the valley east of the Perrillo Mountains to the Agua Prieta and to Bisbee went on a road right by his ranch

(San Bernardino) and right south of Gallardo. Witness further testified (R., 79) that between the road immediately south of Gallardo and the Ceniza springs there is no wagon road that he knew of "unless it is a timber road;" that he did not know of any such wagon road used by people crossing the mountains and had never heard of the pass called the Misa Pass (R., 79). In view of the fact that witness testified (R., 78, 81, 82) that he did not know the Ceniza Pass, a point identified by all the witnesses, his lack of knowledge of the Misa Pass does not tend to any great extent toward establishing its nonexistence. Witness admitted (R., 80) that there was a wood road over the mountains from the Mescal ranch between Gallardo Pass and the Ceniza springs. Witness testified (R., 82), in response to a question as to whether there is a pass north of the Ceniza Pass, that "parties can go on horseback over any of these mountains," and he admitted that while he did not know the Puerto de la Misa, situate about  $2\frac{1}{2}$  or 3 miles south of Gallardo Peak, by that name, "*there may be such a place.*"

Eduardo Camou, sworn on behalf of the plaintiffs, testified (R., 83) that he was acquainted with the place called Agua Prieta and surrounding country, having crossed the Ceniza Mountains at the Puerto de la Ceniza on horseback, and having crossed the mountains at the Gallardo Pass in a vehicle over a well-traveled road to the north of Gallardo Peak; that people from Bavispe and other points south cross the Ceniza Mountains in wagons at the Gallardo Pass, which is the only pass

where parties can so cross, although witness admits (R., 84) that there is a road south of Gallardo, used for wood and *mescal* plant. Witness disclaimed any knowledge of the Misa Pass, but admitted that there is a place about 2 miles south from Gallardo known as the Agua de la Misa.

On cross-examination Camou testified (R., 84) that his father is the owner of the Agua Prieta grant; he admitted that he had been asked by counsel for the Government, on the ground, as to some of these natural objects to which he had referred, and acknowledged that he had then stated that he knew very little about the natural objects down there, but that he would send a man that did know about them, and that he thereupon sent with the Government representative his *mayordomo*, Jesus Montaña, who had been with him eight years, and whom witness then represented as a person thoroughly familiar with the country around there, and who would describe these places to the representatives of the Government. Witness admitted (R., 85) that this Agua de la Misa is on the *east* side of the Ceniza Mountains. As the proof is overwhelming that there is a road from the Agua de la Misa to the Agua Prieta Valley, this admission by witness is in effect the admission of a road and a pass through the Ceniza Mountains at the point contended for by the Government as Misa Pass, a physical fact which witness, however, in terms denied (R., 85), stating not only that there was no road through the mountains between the Gallardo Pass and the Ceniza

Pass for wagons (although the representatives of the Government had two months previous thereto ridden through such pass upon a well-traveled road) (R., 85), but that *there never would be one*. Witness admitted, however (R., 86), that while there was no wagon road through this Puerto de la Misa, he had been through it on horseback upon a trail.

On redirect examination the attorney for plaintiffs attempted to secure from witness a statement as to the Spanish name applied to the pass at the northeast corner of the Bonillas survey, but despite the alleged acquaintance of witness with the country and the alleged notoriety of the name Silla Pass as applied to that place, witness was unable to give any answer on the subject (R., 87).

Colin Cameron was also (R., 91) sworn on behalf of plaintiffs, and testified that his residence is Lochiel, Ariz., at which place he had lived since 1882; his occupation, ranchman, and that he had a general acquaintance with the country involved in the suit, having traveled over it in going to San Bernardino and also in his business as ranchman, the wagon road over which he was accustomed to travel being that going by Gallardo (R., 92). Witness stated that he had been through the Gallardo Pass many times on horseback and wagons; the present road going through on the south side, but the old road having been on the north side, this pass, in his opinion, having no resemblance to a saddle, and so far as witness knew never having been called Saddle or Ceniza Pass. Witness was further asked (R., 93) if there was any pass

in Cochise County that resembled a saddle, but on objection the question was withdrawn. Witness further testified that he did not know any pass in the Ceniza Mountains or elsewhere called the Misa Pass; that while he had crossed these mountains at points south of the Gallardo road on horseback, it was not possible to cross them in a vehicle for many miles south; that there was no "practical" wagon road at the point marked *x*, the west entrance of the Puerto de la Misa, as testified to by the Government witnesses (R., 89); that people from the southeast of Gallardo, in the State of Sonora, cross the Ceniza Mountains through Gallardo Pass, there being no other place to go through with wagons (R., 93). Witness stated that he had gone through a trail, at about the place marked X (R., 94), on horseback as early as 1886, but did not think he ever saw a wagon trail there used, it being impossible for them to go there, and that to go from Santa Cruz to San Bernardino by Fronteras would be entirely out of the road, Fronteras being a good days' ride south of the route at present pursued.

On cross-examination witness stated that he was the claimant before the court in the San Rafael de la Zanja grant, on appeal to this court under the title of *Christie v. United States*, No. 129, October (1901) term, and that he had a small interest in the Agua Prieta grant (R., 95), and that his residence at Lochiel was over a hundred miles from the country in controversy, but that he considered himself entirely familiar with the country; that the next trail south of the Gallardo

Pass is between 2 and 3 miles distant therefrom, and that he had been through that trail and pass, and that said pass  $2\frac{1}{2}$  miles south of the Gallardo Pass is "*a pass that one can go through*, and if a man is in a great hurry he could go quicker on the other side of the river, but a man, unless he has some urgent business, he will always ride the wagon road" (R., 95-96). Witness further testified that he had been through this pass on horseback three or four times; that there is a water hole on that pass, and said water hole is just by the trail and on *the east side of the range*.

This testimony of Cameron actually describes the very pass which the Government witnesses testified to, and shows, despite the assertions of Bonillas and others to the contrary, that there is a pass at the point for which the Government contends.

Witness further testified (R., 96) that the route through the trail or pass  $2\frac{1}{2}$  or 3 miles south of Gallardo, was a shorter method of going from Fronteras to San Bernardino than by Gallardo, and that while there was no wagon road when he was last at that place it is possible to get a wagon road there. This concluded the testimony for plaintiffs.

Mr. Tipton, being recalled by the Government (R., 88), testified as to his having taken a bearing from the Agua de la Misa to the Gallardo Peak, finding the true course to be N.  $13^{\circ} 9'$  E., and the distance, according to an estimate based upon having traveled over the ground and timed himself upon so traveling (R., 90), to be between 2 and 3 miles. Mr. Tipton



indicated on the Bonillas map in evidence (R., 88), by the letter Z, the location of the Agua de la Misa, and by the letter Y, on the same map, the point where the road through the Agua de la Misa joins the road going by the Gallardo Peak, and by the point X, on the same map (R., 89), the point on the same road at the west base of the Ceniza Mountains, the line *X Z Y* representing the course of said road from the west foot of the Ceniza Mountains, *through* the mountains via the Agua de la Misa, to the junction of the road with the Gallardo road (R., 89).

Mr. Flipper, recalled on behalf of the Government (R., 90), testified also as to the bearing taken by himself and Mr. Tipton from the Agua de la Misa to the summit of the Cerro Gallardo, that bearing being N.  $13^{\circ} 9'$  E., as testified by Mr. Tipton. Mr. Flipper also testified (R., 90-91) that the junction of the two roads, one by Gallardo and the other through the Puerto de la Misa, was at the point marked Y, the Agua de la Misa being at the point Z, and the west entrance of the Puerto de la Misa being at point marked X, and that the wagon road connecting these points runs entirely through the mountains from one side to the other. Witness testified that, going westward from the point marked X, he left a well-defined road going southwest toward the valley (i. e., toward Cabullona and Fronteras), and that he himself went over what had been a trail to the point marked "Sulphur Springs" on the Bonillas map, said trail having evidently been used by wagons, but not being a well-defined wagon road (R., 91).

Gavino Ariaga (R., 96), sworn on behalf of the Government, testified as to his living at Santa Cruz, Mexico, where he was born, and as to his acquaintance with the country; that the first wagon road he saw at Santa Cruz belonged to the first Americans who passed on the boundary commission; that wagons were not used around Santa Cruz at that time; that there were no wagon roads coming into Santa Cruz at that time, nor was there any wagon road from Santa Cruz to San Bernardino prior to the opening of this one by the Americans (R., 97).

The Government also presented in evidence, as defendant's Exhibit A (R., 190-212), a certified copy of the expediente of denouncement of the *demasias* of the grant here in controversy, made by the owners of that grant, the Camous, before the Mexican tribunals by proceedings initiated on April 22, 1880. This proceeding is exceedingly instructive, when taken in connection with the map accompanying it, in showing the theory of the Mexican owners of the grant as to the proper location of this grant, and the result obtained by the Mexican authorities in surveying this grant in the presence of such Mexican owners, with their participation, and with all the assistance that could be given by them toward its proper location; and the result of said proceedings establishes very clearly, as contended by the Government, that this grant, whether surveyed by quantity or outboundaries, is entirely within the Republic of Mexico.

On April 22, 1880, José Camóu, son, reciting (R., 212) that he is the owner of certain lands on the

north boundary of the State of Sonora, but in the district of Arispe, known by the names of Agua Prieta, Santa Barbara, Naidenibacachi, Agua de Baltazar, Lo del Gato, Lo de Tomas Romero, and Lo de las Mesteñas, the boundaries of which are set out in their titles, which petitioner promises to present at the proper time, presents an application to the district judge at Guaymas asking that he be allowed to acquire the overplus (*demasias*) in said tracts, if there should be any, after survey, and to that end denouncing said *demasias*, and protesting that he will make proper payments in the terms designated by the law on the matter, and requesting the appointment of the citizen Florencio Rosas as surveyor. On May 31, 1880, the district judge of Guaymas admitted the denouncement referred to in said petition, but without prejudice to a third party who may have a better right, and thereupon appointed the citizen Florencio Rosas to proceed, after his acceptance and oath, and after citing all the adjoining owners and presence of their titles, *to the resurvey and making of the maps* of the lands called Agua Prieta, Santa Barbara, Naidenibacachi, and the four other tracts mentioned (R., 212), with directions to said surveyor that he take special care to make the survey of each of said lands separately, designating both in the minutes of the survey and on the several maps the overplus (*demasias*) each may contain according to their corresponding property titles, subjecting himself to the laws of "July 20" and August 2, 1863, and thereupon forwarding the original pro-

ceedings to the court for further action, but directing that unless the proceedings were executed within ninety days the denouncement would be considered abandoned.

Thereupon, on August 17, 1880 (R., 213-214), upon inquiry of the public treasury as to whether the latter was in possession of the lands denounced, it was replied on August 19, 1880, that it was not known whether the lands referred to were in the possession of the public treasury or not.

On June 9, 1880 (R., 216), there were summoned the parties in interest, to wit, Josè Camou, son, Josè Maria Elias, the municipal president of the towns of Fronteras and Cuquiarachi, also the surveyor-general of the Territory of Arizona, United States, to be present in person or by attorneys "at the place called Agua Prieta on the 28th day of the present month, to defend the boundaries of their properties, in view of their titles, in the survey that will be made on that and the following days."

On the 28th day of June, 1880 (R., 217), the party in interest, Jose Camou, son, represented by Pascual Camou, appeared at the place designated, as did also the municipal president of the towns of Fronteras and Cuquiarachi, when the following occurred, according to the recitals in the *expediente*:

It was made known to them [by the undersigned surveyor] that the survey or resurvey would be commenced from the north cardinal monument of Agua Prieta, *because that one was well known*, and the titles refer to it as a small

hillock (lomita pequeña) situated in the valley of the Agua Prieta toward the east, and a pile of stones is found on its summit or its highest point, and, *there being no opposition whatever*, the course N.  $79^{\circ} 03'$  E. was observed, and there were measured thirteen thousand and ten (13,010) meters to the summit of *the Gallardo hill (cerro) in Saddle Pass, which the titles call for*. A monument was found at the north base of said hill (cerro) and serves as a division between the Republic of Mexico and that of the United States.

It is to be recalled, just at this point, that the north cardinal monument of the Agua Prieta from which the survey was made, because "that one was well known," is the very monument which Mr. Bonillas was unable, in making his remarkable survey, to locate, and is the very monument which Mr. Flipper and Mr. Tipton located as the north center monument of this grant; and it is also worthy of note that this "well-known" north center monument, which was selected in the presence of the owners of the Agua Prieta grant, was selected with "no opposition" from them, but was accepted by them, and, as will be hereinafter seen, was the basis of the patent issued to them; thus showing that not only was this monument "well known" as the north center monument by the public generally, but was accepted by the owners themselves as the north center monument. It is further to be noted, from the proceeding above quoted, that there was no difficulty in locating the Gallardo hill (cerro) in Saddle Pass, as being the place "the titles call for" as the northeast

corner; but that, on the contrary, with the owners of the grant present and the owners of adjoining property all on hand, the Mexican surveyor readily located this northeast corner at the Cerro Gallardo, the point claimed by the United States, and not at a mountain peak ten miles farther north in American territory, as was done by Bonillas.

The survey of June 28, 1880, continues as follows (R., 217):

Thence on a straight line along the whole of the Perrillo Mountains, course S.  $3^{\circ} 41'$  E., there were measured fourteen thousand and fifty-one (14,051) meters to a small, low, rocky hillock (*lomita*) at the base of said mountain, where a pile of stones was made, as the old monument was not found. Thence following the perimeter the titles indicate, an observation was made S.  $79^{\circ} 03'$  W., and there were measured eight thousand one hundred and three (8,103) meters to the monument at the willows the titles call for, and on a hillock (*loma*) close to said willows a pile of stones was formed to serve as a provisional monument, which should be placed in the willows.

This last is apparently the same as the south center monument shown on the Bonillas survey, but it is evident that the southeast corner as fixed by Rosas is not the same as that fixed by Bonillas. The relative location of the points just described will appear from an inspection of the map embodied in this Guaymas *expediente* (R., 210), as compared with the Bonillas map (R., 24).

The remainder of the survey made by Mr. Rosas pertains to grants, other than the Agua Prieta, for which *demasias* were sought; but an inspection of the map (R., 210) and the field notes (R., 216-217) will show that not only was the north center monument of the Agua Prieta tract placed south of the international boundary line, and the northeast corner of that grant placed south of the international boundary line, but that also the northwest corner thereof was placed below the line, being at some point on the course between the *lomita pequenita* and the *monton de piedras* (R., 210), and thus showing that the entire Agua Prieta tract, as located by the Rosas survey, is within Mexican territory.

That this location entirely south of the international line was entirely satisfactory to all parties concerned is shown by the concluding recitals of this survey, where it is said (R., 218): "The adjoining owners, who were present, and the parties in interest were satisfied with what had been done. The municipal president of the towns mentioned presented me an official statement of their satisfaction, which is aggregated to the proceedings."

These proceedings were, under date of July 22, 1880, transmitted to the district court for further action, and thereupon an order was given (R., 219) for parties opposing the proceedings to appear and show cause why the *demasias* (overplus) should not be adjudicated to the denouncer.

From the entry dated Guaymas, July 7, 1887 (R., 220), it is apparent that in response to this edict an

adverse suit was brought against this denouncement by Citizen Plutarco Elias for himself and in representation of his mother and brothers. This proceeding appears in the record as defendant's Exhibit II, page 349. From that proceeding it appears that this adverse suit was brought by the Eliases on the theory that while the Camous were the owners of the legal area of the grant, being the exact quantity sold by the Mexican Government under the original proceeding, they, the Eliases, by virtue of descent, were entitled to denounce the *demasias* or overplus in said grant. The courts, however, overruled this contention, holding, *first*, that the Eliases were not entitled to any more land in Mexico, having exhausted their rights under the Mexican law to public land, and, *second*, that the privilege of denouncing the *demasias* existed in the Camous by virtue of their ownership of the legal area. This proceeding, as above pointed out, is also instructive as showing that the Eliases in 1886 had no interest that they could sell either to Ely or anyone else.

It thus came about that the adverse proceedings brought by the Eliases against the Camous were concluded favorably to the latter, and on July 7, 1887 (R., 220), the present proceedings were ready for completion. On July 13, 1887, the value of the overplus was fixed (R., 221) at \$8,472.94, and there also appears a certificate (R., 221) to the effect that there had been produced the title papers presented in this case dated December 28, 1836, for the grant of 18 sitios 12½ caballerias comprised in the places called Agua Prieta, Naidenibacachi, and Santa Barbara, and also conveyances



from the Eliases in favor of Messrs. Camou Brothers, by which these gentlemen remained owners of these lands, and also the contract of dissolution of the firm of Camou Brothers, in virtue of which José Camou, son, the petitioner, became the absolute owner of the grant.

On August 5, 1887, the district judge of Guaymas decreed (R., 222) that said lands being monumented, the owner was entitled, under article 5 of the law on public lands, being the law of July 22, 1863 (Hall's Mexican Law, paragraph 617), to a reduction of one-half the price as above fixed.

On August 6, 1887, the liquidation was accordingly corrected by deducting one-half of the value of the land.

It will thus be seen that not only did the owners of the grant in Mexico acquiesce in the fact that the monuments as found by Mr. Rosas correctly limit their grant, but that also by virtue of the existence of these monuments they secured from the Government a reduction of one-half of the purchase price of the *demasias* denounced. It also appears that for the purpose of bringing himself within the other conditions of said paragraph 5 of the law of July 22, 1863, which required not only the existence of artificial monuments, but also possession for ten years or a title translativo of dominion (Hall, 617), Mr. Camou had previously, on July 12, 1887, asked to be allowed to produce testimony as to such possession (R., 224). Thereupon (R., 225-227) the testimony of witnesses was taken on this subject.

On August 22, 1887 (R., 227), the district judge recites as follows:

Having examined the map and proceedings of survey made and executed by citizen Florencio Rosas, in strict conformity with the laws of July 22 and August 2, 1863, the report of the office of the chief of the treasury, which says that it does not know whether or not the public treasury is in possession of the land denounced and in virtue of which, and in compliance with the provision of article 17 of the first of the two laws hereinbefore cited, it was ordered published three consecutive times in the official periodical, *La Constitucion*, and it appearing that within the terms of these edicts opposition was made to the adjudication of this overplus (*demasias*) by citizen Plutarco Elias, for himself and in representation of his mother and brothers, which suit was terminated adversely to the opponent; having examined the last liquidation of the value of said land made by the office of the chief of the treasury, the statement of the promotor fiscal, and everything else set out in these proceedings, this court decrees: First. There is adjudicated in possession and without prejudice to a third party who may have a better right, to citizen José Camou, son, the overplus (*demasias*) of the ranches "Agua Prieta," "Santa Barbara," "Naidenibacachi," "Agua de Baltazar," "Lo del Gato," "Lo de Tomas Romero," and "Lo de las Mesteñas," for 70,607 hectares, 90 ares, 86 centiares (seventy thousand six hundred and seven hectares, ninety ares, and eighty-six centiares), which appear

from the proceedings of survey and corresponding maps. Second. The present adjudication shall have no effect whatever if not first approved by the department of public works, to which, through the executive of the State, a *testimonio* and copy of the corresponding map will be submitted. Third. That the party interested in the land adjudicated shall not be put in possession, and that it is not included in any of the commissions or surveys in the district of Arispe, where it is situated, unless first certified by the office of the treasury, in which it appears that he has paid its value and the stamps affixed to the title.

On October 27, 1887 (R., 229), the department of public works at the City of Mexico, upon considering the *testimonio* of the proceedings in the district court above referred to, noted a discrepancy between the amount of the overplus (*demasias*) reported by the subordinate authorities and the proper amount as shown by the survey and the expedientes of the original grants, and decides that the overplus is only 65,341 hectares and a fraction, and not 70,607 hectares and a fraction, as stated by the surveyor and as appraised by the authorities at Guaymas (R., 221). The department of public works, in the same decision, notes also the following defects in the previous proceedings (R., 229). It declares that the proof upon which was based the reduction of one-half of the price of the lands was not sufficient, for in the first place the ten years possession necessary under the law of July 22, 1863, is ten years prior to the date

of that law, and not ten years prior to the date of taking testimony; and in the second place, although it is shown in the *testimonio* that the land has been monumented at all the angles, this is shown to be false, in that only two monuments had been found by the surveyor—one to the north, on the boundary line of the United States (being the north center monument at the *loma pequeñita*, as above pointed out) at the point where he began the survey, and the other to the south, belonging to the commons (*ejidos*) of Fronteras; and in the third place there was no proof that the adjudication of the *demasias* in question was free from prejudice to companies making surveys of public lands in that vicinity. The matter being remanded to the district court at Guaymas for further proceedings upon this decision, a recalculation of the area of the *demasias* was made (R., 232), resulting in the determination that the *demasias* or overplus was 70,607 hectares and a fraction. Further testimony was taken in behalf of claimants, showing possession not only for ten years prior to the date of taking such testimony, but also extending back to the date of the grant in 1836 (R., 233–236).

Thereupon (R., 236) Mr. Camou submitted his cause upon the new record showing the amount of *demasias* finally determined by the surveyor, the length of his possession, the fact that the adjudication would not prejudice the rights acquired by the surveying companies, and the fact that while it was true that in the execution of this survey only two monuments on the

ground had been found (one of them, as will be recalled, being the north center monument) this objection was met by the fact that the frontier of the State had been for a long time subject to the incursions of the Apaches, rendering it impossible, when monuments were destroyed, to replace them immediately (R., 236-237). This proceeding was thereupon transmitted to the department of public works, with the result that on January 30, 1888 (R., 228, 238), a title for said demasias was issued by the President of the Republic in favor of Mr. José Camou, son, for the demasias denounced, the amount paid being \$4,236.47 (R., 238). The receipt of Mr. Camou for this title, dated April 6, 1888, appears in the record, page 238.

This proceeding establishes not only the fact that the grant is entirely within the Republic of Mexico, when surveyed by outboundaries, but also that the Mexican Government satisfied in full the claim to the legal area mentioned therein. The denouncer did not pay for the area covered by the title, which was 18 sitios  $12\frac{1}{2}$  caballerias for one title (the Agua Prieta, Santa Barbara, and Naidenibacachi title) and  $10\frac{1}{3}$  sitios  $3\frac{1}{3}$  caballerias for the other, but paid only for the balance of the total area after deducting the area covered by the title (R., 231-232).

The Government also introduced in evidence on the trial of the cause (R., 241-254) a certified copy of the expediente of denouncement of a tract of public land, adjudicated to Josefa Rodriguez, Maria Bustamante y Salazar, and Refugio Miranda, and amounting to 3.9

sitios, or 16,920 acres, situate *between the north boundary of the Agua Prieta grant and the international boundary line.*

This proceeding was initiated on May 4, 1881 (R., 254), when the parties above named made a petition alleging that "there are situate between the ranches of Agua Prieta and Naidenibacachi on the south and the line of the United States on the north some vacant public lands, and that being interested in settling said lands for the purpose of exploiting the different branches of wealth they contain, with the right which the law of July 22, 1863, concedes to them, they formally denounce, and to the extent of 2,500 hectares for each of them, the tract of land described, agreeing to pay the value of the land at the proper tariff price, and asking for the survey thereof."

On May 21, 1881, this denouncement was admitted and one Rosalio Banda was appointed to proceed to make the survey, after citation of the adjoining owners and in presence of their title. On May 4, 1881, two of the petitioners, Josefa Rodriguez de Valencia and Maria Bustamante (R., 255), had executed a power of attorney to Juan P. M. Camou (who, it will be recalled, was interested in the Agua Prieta tract) to represent them in making and prosecuting the denouncement of this land between the ranch of Agua Prieta and the international boundary line. On May 21, 1881, the denouncement referred to was admitted without prejudice to a third person who represents a better right, and the surveyor, Mr. Banda, was appointed to proceed to

make the survey, but Mr. Banda being absent there was substituted for him, as surveyor, Francisco Dublé, on petition dated June 28, 1881, by Juan P. M. Camou, representing the petitioners, as above stated. (R., 257-258.)

Pursuant to the terms of his appointment, Mr. Dublé, on June 20, 1881, issued summons to the adjoining owners, José Maria Elias, owner of the ranch of San Pedro; Pascual Camou, owner of the ranches of Agua Prieta and Naidenibacachi, and Jesus Maria Ainsa, representing the lands surveyed to one Rochin and associates, situate to the east of the Agua Prieta tract (see map Cochise County, R., 458), to be present on the 24th day of July, and at the northwest corner of the land of Mr. Camou to defend their boundaries with their titles.

Mr. Pascual Camou, the owner of the Agua Prieta grant, attended (R., 261-262), but Mr. Elias, representing the San Pedro grant, was not present, but sent a communication (R., 262), stating that he did not believe there was any vacant land between his ranch and those of Mr. Camou. The survey proceeded on July 24, 1881 (R., 262), when the parties proceeded to the northwest corner of the land of Mr. Camou, on the boundary line of the lands of San Pedro. Mr. Ainsa, representing Rochin and associated interests on the east side of the lands sought for, and Mr. Pascual Camou, representing the Agua Prieta interest, were in attendance, and the survey was started upon the monument known by the name of "pile of stones," from

which there was traced a line running N.  $29^{\circ} 30'$  W., which at a distance of 4,000 meters reached the international boundary line. The pile of stones, as shown by the plat embodied in these proceedings (R., 252-263), was the northwest corner of the Agua Prieta, Santa Barbara, and Naidenibacachi grants, which is by these proceedings thus shown to be 4,000 meters south of the international boundary line. After encountering the international boundary line the survey was run true east 43,700 varas, ending at a monument on the American line, which was taken for the limit on the east of the vacant lands which were being surveyed. This monument, as is shown by the plat (R., 252), is in the immediate vicinity of the Cerro Gallardo, and is evidently international monument 82, which was international monument 19 on the Emory survey.

The survey was resumed on the next day (R., 263), when a measurement was taken from the said international monument to the *northeast monument of the lands of Mr. Camou, on the Gallardo hill (cerro)*, which was found to be at 920 meters from the American monument, on a course S.  $5^{\circ}$  E. Thus, the Mexican surveyor, in a proceeding to which the owners of the Agua Prieta grant were parties, fixed the northeast corner of that grant not at College Peak, miles within the American territory, as contended by Mr. Bonillas, but on the slope of the Gallardo Peak, and at a point about a half mile south of the international boundary line.

Continuing the survey (R., 263) from the northeast corner of the Camou or Agua Prieta grant, which was



the southeast corner of the public land sought to be secured, a line was run along the north boundary of the Camou lands on a course S.  $79^{\circ}$  W. for a distance of 13,140 meters, ending at the little hill (*lomita*); whence on a course S.  $69^{\circ} 30'$  W. the line was continued to the starting point. The attention of the court is called to the fact that this little hill or *lomita* monument is the same which has been encountered in the discussion of this cause twice before—once as the north center monument of the Agua Prieta original survey; and second, as the north center monument of the survey made by Mr. Rosas of the Agua Prieta grant on the denouncement of the *demasias* initiated on April 22, 1880, when this monument is spoken of as being the one well known monument of the Agua Prieta grant (R., 217). The proceedings further recite that these last two lines were *traced in agreement with the map and titles of his lands which Mr. Camou presented* (R., 263), and conclude with the statement that the operations of this day were concluded, there being present as attending witnesses *Mr. Camou, as owner of the coterminous lands and as representative of the parties in interest*, and Mr. Jesus Ainsa, in representation of the vacant land surveyed for Mr. Cirilo Rochin and sons. Mr. Camou's name appears affixed to this proceeding in acquiescence in this denouncement as public land of what Mr. Bonillas claimed was, after all, Mr. Camou's own land (R., 263).

On July 26, 1881, the tract thus surveyed was divided among the three petitioners, the eastern portion

thereof being given to Mrs. Refugio Miranda, with the following description: "On the west, the lot of Mrs. Bustamante to the extent of 2,100 meters; on the north, the American line to the extent of 26,810 meters; on the east it is bounded by the vacant land surveyed for Rochin and associates and is separated by a line of 920 meters, and on the south it is bounded by the lands of Mr. Camou, limited by two lines, the one, of 13,140 meters, starts from the Gallardo hill (cerro) and ends at the monument of the *little hillock (lomita)*, and the other, of 14,255 meters in length, starts from the *little hillock (lomita)* and terminates at the southwest corner of Mrs. Bustamante."

Said denouncement was thereupon published for three consecutive times in the official periodical of the State, as provided by article 17 of the law of July 22, 1863 (R., 265), citing parties having objection to said denouncement to appear and contest the same. The land was valued by the proper officials at \$840.56 (R., 267); and on March 2, 1882 (R., 270), Mr. J. P. M. Camou, the owner of the Agua Prieta, and acting as attorney in fact for the three petitioners, gave his receipt for the three titles to this property, describing it as *a tract of public land*. And yet Mr. Bonillas says that this was *not* public land. It is very peculiar that if Mr. Camou owned it he was not aware of it, and left this for Mr. Bonillas to discover years afterwards.

The Government also presented in evidence at the trial (R., 359) the withdrawal by Mr. Camou from the consideration of the surveyor-general of Arizona of

the grant now in controversy, referred to in plaintiff's petition (R., 5). The letter of withdrawal addressed to John Wasson, surveyor-general of Arizona, dated July 15, 1880, is in Spanish and a translation thereof appears to have been omitted from the record. It is as follows:

HERMOSILLO, *July 15, 1880.*

MR. JOHN WASSON, *Tucson.*

MY ESTEEMED FRIEND: I reached this city last night, leaving the survey I went to make on the frontier concluded.

Finally, there is no land in American territory, as we believed, and all (that of the two titles) is in Sonora; because of which, the examination of these titles by the Government of that country now has no object, and you can deliver to Mr. Demetrio Velasco the copy in English of the Naidenibacachi which I left.

By this stage of Moreno, and in care of Mr. Velasco, I forward the book which you had the kindness to lend me, giving you a million thanks, for it was very useful to me.

Your ever affectionate friend and obedient servant,

PASCUAL CAMOU.

Thereupon Mr. Velasco, representing Mr. Camou, receipted for the title to the Agua Prieta grant (R., 359), withdrew it from the consideration of the surveyor-general of Arizona, and carried it back to Mexico. Thus Mr. Camou, not only by his acts in assisting and acquiescing in the survey of the *demasias* and in the subsequent survey of public lands between his

line and the international boundary line, placed his land entirely in Mexico, but also by his express declaration withdrawing the grant from the consideration of the only officer provided by the United States for the consideration of grants at that time, and by his express declaration in so withdrawing it that none of it was in American territory, showed that this was not a claim for consideration by any American tribunal, but that it was purely a matter for consideration by the Mexican Government, and that to that Government Mr. Camou looked for the satisfaction of his grant. And yet Mr. Bonillas shows by his survey that Mr. Camou was all the time entitled to 68,530.05 acres in American territory. It is believed the court will be able from the attitude occupied by the Camous in this matter, which has always been one of denial of any claim against the American Government growing out of this grant, to deduce the reason why when appellant Eduardo Camou came into this case at the eleventh hour it was upon a *quitclaim deed* dated after the beginning of the trial.

#### BRIEF AND ARGUMENT.

The two questions in this case are, *first*, the extent of the grant, and, *second*, its location. It is confidently submitted by the Government, on the second proposition, that the grant, whether one for the quantity named or one by outboundaries, is entirely within the Republic of Mexico, so that a discussion of the first proposition, including the question of the right of the claimants to the *demasias* or excess of the quantity

within outboundaries over the quantity paid for, is not necessary to the present record. A few considerations as to the effect of the title papers on the subject of quantity, however, seem proper as preliminary to the controlling question of location.

# I.

*In this grant there passed to the claimants the quantity paid for—no more, no less.*

(a) This was  $6\frac{1}{2}$  short sitios, or about 28,199.66 acres. The area included in the Bonillas survey is 163,799.48 acres. The title papers here presented are not different from the other Arizona grant cases decided by this court. The amount that passed to the grantee was the number of sitios just stated.

*Ainsa v. United States*, 161 U. S., 208.

*Ély's Admr. v. United States*, 171 U. S., 220.

*Perrin v. United States*, 171 U. S., 292.

*United States v. Maish*, 171 U. S., 277.

(b) It was sought in the court below to differentiate this case from those just cited, on the contention that the title papers make this the grant of a place with the boundaries named in the original petition of July 21, 1831, and not a grant by quantity. It is not believed that there is any force in this contention.

The fact that a general description of the land by natural objects is given in the original petition was nothing more than a designation of the particular locality within which the quantity purchased was to be located. None of the monuments of the survey, even

as located by Bonillas, reach to the objects named. In fact the only one of the objects named in the petition as to which there is any proof of location is the Chiricahua Mountain range. There is no proof of the location of "the lands of the Sinaloas, the mountains of Coaguilyona, or Cabuyona, and the lands of the Ians" (the last named being in the title papers *Saus*), and there is apparently no knowledge as to their location; so that if the grant were one by natural objects, the claim would still fail for lack of proof as to the situation of the objects. The location of the Chiricahua Mountains is well known, but no portion of the Bonillas survey goes near them. It is claimed by plaintiffs that the northeast corner of his survey at College Peak is at these mountains. On this proposition, however, the maps are against the claimants. An examination of any of the official maps of Arizona will show that College Peak is at a very considerable distance from the Chiricahua Mountains, which run from northwest to southeast and come out near San Bernardino, and are not within miles of any point on the boundary of the Bonillas survey. [See map Cochise County (R., 358); also map of Territory of Arizona, issued in 1897 by the General Land Office.] If it was the intention to grant this as a tract by name, with the boundaries just cited, the measurement of the tract, which was made with great care, and the recital of quantity, which is made with great reiteration, would seem to have been empty formalities. If

it be said, however, that the purpose of the measurement was to ascertain the area within the natural objects so as to afford a basis for fixing the purchase price, it is passing strange that the original surveyor did not go to a single one of these objects. At the present day, if it be desired to find out the number of acres within given natural objects the method promptly pursued is to measure to and between those objects and to calculate the area upon the basis of the distances and courses. In this case, however, nothing of the kind was done. The surveyor in 1835 does not mention having gone to lands of the Sinaloas in running to the south, or the mountains of Coaguilyona or Cabuyona in going east, or the lands of the Ians or Saus in going west, or the Chiricahua Mountains in going north. Had he been measuring to either of these points to ascertain the area within them he would inevitably have mentioned them in his survey. The fact that they are nowhere referred to after we leave the petition shows that they were mentioned simply as terms of general description and as indicative of the locality and general outlimits within which the quantity purchased was to be laid off.

## II.

*This grant, if considered as one for the quantity named, is entirely within the Republic of Mexico.*

The center point of this grant is shown to be at a small lake called Agua Prieta, located about 18,000 feet, or over 3 miles, south of the international boundary. The *expediente* says that the grant measured 100

cords, or 2.6 miles, from the center to the north center monument. Thus, the grant when laid off accurately, according to the quantity paid for and with the measurements stated in the *expediente*—the method indicated by this court in Ely's case as the proper one for location—is entirely south of the line. No portion of the *cabida legal* is in the United States. On this point there can be no issue raised by claimants, as the testimony of Mr. Bonillas (R., 2, 21), as well as his map (R., 24), shows this to be the fact. To the same effect is the testimony of Messrs. Flipper and Tipton, for the Government (R., 33-61).

### III.

*The grant laid off according to the natural objects and without regard to quantity is entirely south of the international line.*

It was upon this issue that most of the oral testimony at the trial was taken. All of this has been hereinbefore abstracted and much of it has been already discussed. At the risk of repetition it seems proper to recall to the attention of the court some of the main points in that testimony showing the grant to be entirely south of the international line.

(a) The north center monument of stone is recited to have been placed on "a very small hillock fronting Saddle Pass to the east." Bonillas was unable to find any such monument, for the reason that instead of looking for it at approximately the distance from the center mentioned in the titles he looked for it 8 or 10 miles away. Proceeding on the assumption that when



the surveyors say 100 cords they mean 400 or 500—and this notwithstanding the fact that the Agua Prieta Valley is almost level, and thus capable of accurate surveying—he necessarily failed to find facts to fit his theory. The agents of the Government, however, testified that following up the valley they found at the end of about 3 miles from the center, and almost due north therefrom, an old monument of stones on the top of a very small hillock. This hill is directly in front of the pass at Gallardo Peak, which is called the Saddle Pass in the survey of the grant made by the Mexican Government on the denouncement of the *demasias*, and which will be hereinafter discussed. It is thus a monument according entirely with the *expediente*, against no monument at all in the Bonillas survey, and must thus be accepted by the court as the north center. It also has the merit of being the same monument located by the Mexican surveyor Florencio Rosas as the “well-known” north boundary of the grant upon the survey made by him on June 28, 1880, in the presence and with the cooperation of all the interested parties (R., 217), for the purpose of ascertaining the amount of land within the boundaries preparatory to payment for the *demasias*. And this location was also adopted and followed by the Mexican surveyor Francisco Dublé, when, in 1881, in the presence of and with the assistance of Mr. Pascual Camou, the owner of the Agua Prieta grant (the latter also appearing as attorney in fact for the denouncers of public land between his Agua Prieta grant and the international

boundary line), Mr. Dublé found the "little hillock" (*lomita*) at precisely the same point as Rosas, Flipper, and Tipton, and at the point "in agreement with the map and titles of his lands which Mr. Camou presented" (R., 263).

(b) For the northwest corner, which is a "small hill" (*cerrito*), Bonillas went into the Mule Mountains. Had he found the north center monument, to which the Government's witnesses have testified, and thereupon faced due west, he would have discovered on the horizon, at the north end of the Naidenibacachi Mountains, which constitute the west wall of the grant, a number of small hills. The most northerly of these is the natural northwest corner of the grant, since it is at the north extremity of the object constituting the west boundary, just as the pass at Gallardo is at the north end of the mountains constituting the east boundary. Between these two mountain ranges lies an almost level valley 15 or more miles in width and in which the grant was sought. It is the contention of the Government that this northernmost hill is the northwest corner of the grant. As the testimony shows that they are all south of the international line, although very close to it (R., 55-62), a line from the north center to the northwest corner would throw the west half of the grant entirely below the line.

(c) The attention of the court is also called to the map and field notes of the survey made by F. W. Oury on behalf of claimants (R., 6, 186). The difference between this survey and that executed by Bonillas as

to the north boundary, as well as the other boundaries, will be at once remarked, and clearly shows that from claimants' standpoint the location of the grant is purely a matter of conjecture, varying with every new survey. Mr. Oury found a north center monument a short distance north of the international line. Mr. Bonillas found none. The former found 43,499 acres of this grant in American territory; the latter found 68,530.05 acres. As a matter of fact, however, neither Oury nor Bonillas is correct. The north boundary of the Agua Prieta tract never went north of the international line.

(d) Coming now to the northeast corner, it will be found that this is located by the *expediente* at "a small hillock (loma) to the right and near two others that are higher near Saddle Pass." Such a hillock is found near Gallardo Peak (R., 41) and there is a pass on both the north and the south sides of that peak. There is no oral evidence from those living in the locality that this is called Saddle Pass. Neither is there evidence for claimants from any one, except Bonillas, who has never lived nearer to the locality than Nogales, a hundred miles away, that the northeast corner shown on the Bonillas map is so called. In view of the fact that claimants introduced witnesses who live near the locality, among them Eduardo Camou, one of the claimants and a resident of the very ranch in controversy, it is peculiar that no attempt was made to show that the pass near College Peak was known as Saddle Pass. The pass claimed by the Government to be

Saddle Pass runs between a solitary *cerro*, called Gallardo, and a range of mountains commencing a short distance away and running northward. To one inclined to studies of nature the appearance of this pass lying between Gallardo as the pommel and the mountain sloping upward a short distance away is not unlike a saddle when viewed from the west. There is as much ground for calling it "Silla Pass" as there is for so naming the other to the north. That it is actually so called is shown by the plat and survey of this grant made under the direction of the Mexican Government and at the instance and with the participation of the owners of the Agua Prieta grant in 1880-1886, where this pass is declared to be the *Puerto de la Silla*, or Saddle Pass. Upon this point the attention of the court is recalled to the Rosas map (R., 210) showing "Cerro Gallardo in the Puerto de la Silla;" also (R., 217) to his field notes of that survey mentioning "the summit of Gallardo hill (*cerro*) in Saddle Pass, *which the titles call for*;" also to the field notes of the Dublé survey of July 25, 1881, where "the northeast monument of the lands of Mr. Camou" is located "on the slope of the Gallardo hill (*cerro*)" (R., 263, and plat of same survey, R., 252).

(e) Claimants contend, however, that the pass at Gallardo marks not the northeast monument of the grant, but the east center monument, and this for the reason that "the old road from Santa Cruz to San Bernardino" passes at Gallardo, and because that road under the titles marks the east center monument. The

proper translation of the titles on this point is that the east center monument is "on a high hillock (loma), which is to the right of the pass where the old road passes from Santa Cruz to San Bernardino." It is contended by claimants that the main road from Santa Cruz to San Bernardino runs through the pass at Gallardo now and has done so for years; *therefore*, it so ran at the date of the grant. It is to be noted, however, that the road referred to in the titles is "the old road," not the road then in existence. Even if the claimants had established that the traveled road between those points ran by Gallardo at the time of the grant, it would still be far short of proving that its east center was at Gallardo. The title locates that center with respect to the old road, thus indicating a distinction between an old road and a road then in common use. This old road could not have been the Gallardo road for the reason that that road is shown by abundant historical evidence to have been opened only in 1846 by Lieutenant-Colonel Cooke, the diary of his expedition in evidence showing that it was cut through mesquite and made passable for traveling only with great difficulty (R., 337-339). That this was the first wagon road through that country is shown by the testimony of witness Gavino Ariaga (R., 96); before that time all travel was by trails. Therefore, even if in 1835 there was a trail from Santa Cruz to San Bernardino via Gallardo—even if *the* traveled trail between those points then went thus—the question still remains, Where was the "old road" or "old trail" mentioned in

the survey of 1835? This, it is contended by the Government, the title papers fix at what is known as the Misa Pass, to the right (south) of which is found a high hillock (*loma*) conforming to the titles (R., 41-42.) This pass is 3 miles south of Gallardo and as many north of the Ceniza Pass, at which latter the southeast corner is confessedly located. A few of the reasons supporting this position will now be presented.

(f) That such pass exists as the Misa Pass is abundantly shown by the proofs. Special Agents Tipton and Flipper testified fully to the character of the pass, to the fact that they in company with the writer had ridden through it in a carriage a month before the trial, and to the fact that there is water on it, thus making it the preferable method of getting through the mountains, since there is no water on the pass running by Gallardo (R., 39). The proof is also abundant that there is an excellent wagon road following the pass and leading toward Cabuyona and Fronteras on the west of the mountain and to San Bernardino on the east of the mountain. Claimants contend, however, that there was no *wagon* road there up to a few years ago. The appearance of this road at the present time, as described by the Government witnesses, is such as leads to the belief that it has been in use for many years, notwithstanding the testimony of Cameron, Camou et al. *contra*; but assuming that the wagon road has been only recently constructed, that does not affect the proposition that a trail—an "old trail" in 1835—went through that pass; and that travelers from Santa

Cruz to San Bernardino did so go at an early date is a matter of great probability. As is historically known, up to within a few years the country about Agua Prieta has been the abiding place of hostile Indians, and travel from the earliest times between Santa Cruz and San Bernardino has been attended with the greatest difficulty and danger. This danger and difficulty increased with each mile farther north. The Spaniards held a reasonably secure position southward, but from what is now the international line and thence to the north for many leagues the Apaches were almost the undisputed possessors of the soil. Thus, in traveling east and west it was advisable—indeed, necessary—that the route taken should be as far southward as possible. If a *presidio* or garrison existed between the starting and objective point, it was always thought best to keep within the curtilage of such a settlement, even if the journey thereby became a little longer. Time was of little value as compared with life—and the Apaches were implacable foes. These very conditions existed as to travel between Santa Cruz and San Bernardino in the early days. By taking a southern route from one place to the other the Indians were kept at a distance and by such a route the traveler passed through Fronteras, an important *presidio* from the earliest times and the only one in that section of country (R., 40). Such a route exists even at the present day (R., 41), when the north route has been made entirely safe by the strong arm of the American Government. In going via Fronteras to San Bernardino, or to Santa Cruz via

Fronteras, the shortest journey is by way of this Misa Pass and not miles away to the north around Gallardo (R., 96); and it is entirely reasonable, probable, and to the unprejudiced mind conclusive that that was the method of travel when the "old road" or trail was in use prior to 1835. Nor would such a route, as suggested by counsel for plaintiffs on the argument of the case in the court below, have subjected the traveler to dangers of ambushade that he would have avoided by going on the longer route via Gallardo. The trail or road through Misa is no more exposed to ambushade than that contended for by claimants around the north side of Gallardo; both were through the mountains, but the Misa road was much the less exposed to danger in that it was farther south and shorter and thus more easy of access to and from the soldiery of the presidio of Fronteras, and in addition is through a pass that is practically a narrow valley (R., 40).

(g) The Government's position that the old road of the title papers ran through Misa Pass, and that the east center of the grant is thus there, rests not alone upon theory, however strong and plausible, but upon the plain statement of the *expediente* and the principles of pure mathematics. The position of the southeast corner is uncontroverted. It is claimed to be located at and was found at Ceniza Pass, and the Bonillas map shows it to be there. The Government, after investigation, accepted this as a proper location. The *expediente* description of the location of this southeast corner is as follows: "At the foot of the *first pass*



which is to the right of the point where the cross monument of said course ended." The word "right" as thus used means "southward," the observation being taken by a surveyor going eastward from the center. The southeast corner is thus at the first pass south of the east center monument. Suppose, however, that we locate the east center where the claimants have put it—at Gallardo Peak. There will be *two* passes between it and the southeast corner, one on the south side of Gallardo, along which the wagon road to San Bernardino now runs, and another through the Misa Pass, through which a wagon road also runs. But as the *expediente* says the southeast corner is at the *first* pass south of the east center monument, the Bonillas location is thereby erroneous and must be rejected. If, however, the east center be considered as located to the right of the Misa Pass, this makes the pass at which the southeast corner is located the first pass south of the east center, as stated in the *expediente*. Counsel for claimants recognized on the trial the dilemma in which the existence of this Misa pass placed them and sought to avoid it in the assertion that no such pass existed. How poorly they succeeded, in the face of the physical facts and the positive testimony of Messrs. Tipton and Flipper, is clearly developed by the record. The truth of the matter is evidently that Bonillas, either intentionally or otherwise, overlooked this pass in making his remarkable survey and was ashamed to admit it on the trial. With the positive proof of its existence contained in the record, the last vestige of plausibility in his survey is destroyed.

(h) Upon the proofs just discussed the Government has clearly established that this tract lies entirely below the international line. It is more than a coincidence that the Mexican Government and the grant owners themselves have in times past reached the same conclusion. This has been heretofore alluded to, but a few additional considerations remain to be here noted; and preliminary to this, the attention of the court is called to the fact that upon the record the plaintiff, Santiago Ainsa, administrator, has no interest in the grant authorizing him to bring this suit. Ainsa claims under certain Eliases, descendants of the original grantees by various deeds presented in evidence, the earliest dated December 24, 1886 (R., 165). In 1862, however, the ancestors of the Eliases, who conveyed to Ainsa's intestate, Mr. Ely, mortgaged all their interests to the Camou Brothers, of Guaymas (R., 271). In 1869 the testimony of the Eliases was taken in the Mexican courts, showing that the Camous had succeeded to all their rights in this grant (R., 276-282). On a subsequent denouncement of *demasias*, instituted by the Camous, the same Eliases again contested their rights, ending with a decision in favor of the Camous and an adjudication that the Eliases had no interest in the grant. (Defendant's Exhibit II, R., 349-357.) These proceedings went to the ownership of the whole title, and established that the Eliases, under whom Ainsa deraigned title, were without title when they conveyed to him, and thus Ainsa, administrator, at the time he instituted this suit, was without title. Counsel for

claimants, recognizing the force of this contention, secured permission, after all the testimony had been taken in the cause, to amend their petition by making Eduardo Camou, who had previously testified as a witness for claimants, a complainant. (R., 26.) The latter thereupon presented his quitclaim deed from Juan Pedro Camou, dated only a few days previous. There is nothing in the record to show how Juan Pedro Camou secured title from Pascual Camou, the owner of the premises in 1880-81, so that there is no title shown, even in Eduardo Camou, enabling him to prosecute the suit, and the cause should be dismissed on that ground. But if it be assumed that Juan Pedro Camou and his grantee, Eduardo Camou, succeeded to the rights of Pascual Camou, they took such rights burdened by what Pascual Camou had previously done affecting the location of the grant and are bound by his acts. This branch of the case will therefore be discussed (the Elias people being eliminated) as pending upon the complaint of Eduardo Camou deraigning title from Pascual Camou and holding such title subject to all the burdens placed thereon by said grantor.

(i) This claim having been originally presented by one who had no title to the premises, the rights asserted under it must be adjudged by the court as of date when some one having title appeared to invoke the jurisdiction of this court. Considering this claim therefore as presented by Camou in May, 1899, and admitting *arguendo* his right to prosecute it, it is obvious that so far as it is a mere imperfect or equitable claim it is

barred by the two years provision of the act of 1891. Whatever may be said of the claim to the *cabida legal*, which is confessedly in Mexico, it is certain that the claim to the *demasias* is at best the assertion of an imperfect or inchoate title and therefore barred.

(j) This claim was presented at an early date to the surveyor-general of Arizona by the Camous, the owners of the grant. On July 15, 1880, Mr. Camou withdrew the claim from the consideration of the surveyor-general (R., 359), in a letter, in which he says: "Finally, there was no land in American territory, as we believe, and all (that of the two titles) is in Sonora, because of which the examination of these titles by the Government of that country now has no object."

This admission by claimant Camou's predecessor in title is binding on him. It also explains the reason why Juan Pedro Camou never filed before the court a claim for this property and never joined in the suit already filed, and also why the deed he gives and upon which his son at this eleventh hour comes to the rescue of Mr. Ainsa is a mere *quitclaim* for the portion of the property lying north of the line.

(k) Not only have the owners of this property thus declared that none of it is in the United States, but that this is the status of the property has been agreed upon by the Government of Mexico and the owners in a proceeding for the denouncement of the *demasias*. The attention of the court is respectfully recalled to the *testimonio* of denouncement of *demasias*

for this and other tracts, initiated April 22, 1880, and introduced as defendant's Exhibit A. (R., 212.) An examination of that proceeding and the plat attached thereto will show that the *cabida legal*, or amount sold, was there declared to be  $6\frac{1}{2}$  *sitios*; the total area to be bounded on the north by a line some distance south of the international boundary, and the northeast corner of the grant to be not at College Peak, but at Gallardo Peak, the point contended for by the Government. It will be noted, further, that the north center monument in that survey is located exactly where Special Agents Tipton and Flipper testify they found it, and the Saddle Pass also at the point claimed by the Government's witnesses. This survey, with *cabida legal* and *cabida total* so laid out, was approved by the Federal courts at Guaymas, was approved by the department of public works at the City of Mexico, and, finally, patent covering the *demasias* so ascertained were issued to the Camous by the President of the Republic himself. (R., 238.) The acceptance of this survey and this patent without objection, but with every evidence of acquiescence and approval, forever precludes the Camous, or those deraigning under them, from asserting that that survey is wrong.

(l) The Mexican Government further declared the *situs* of this property when in 1881-82, on the application of three parties, it had the tract lying between the north boundary of this grant and the international line surveyed as public land of the Mexican nation and thereupon issued patent therefor as public land

(R., 254). That survey retraced the north line of the Agua Prieta, fixing its north center monument exactly where the survey of the *demasias* proceeding had placed it and where the investigation of Messrs. Tipton and Flipper has since located it. The same survey fixes the northeast corner at Gallardo, just as contended for by the United States. Throughout this whole proceeding there was present Mr. Pascual Camou, then owner of the Agua Prieta grant and under whom plaintiff Camou derails title; and he (Pascual Camou) not only acquiesced in this proceeding fixing his north line in Mexico and declaring to be public domain the land *between* his line and the international boundary, but actually appeared as attorney in fact for the three persons upon whose petition it was being done (R., 254-270). It is difficult to imagine a stronger case of estoppel.

(m) In the court below claimants' counsel objected to these proceedings as irrelevant—upon what theory it is hard to conceive. As a proceeding *in rem*, and as thus expressive of the attitude of the former Government toward property within its territory, and toward a grant which it had made, similar proceedings in the Nogales case were considered by this court of controlling weight. (*Ainsa v. United States*, 161 U. S., 208.) They are, however, clearly admissible as declarations against interest by the parties owning the property, and thus binding upon their grantees. Plaintiff Camou derails title under these parties (if he has title at all) by deed dated long subsequent to

the conclusion of the proceedings and the issuance of the patents based thereon. Their proceedings are *his*, and he is as effectually bound as though he had been the denouncer of the *demasias* in 1880 himself, or had in person been present at the above-mentioned proceedings of 1881-82. Claimant Ainsa (who, however, has no standing here) is also bound since the Eliases, from whom he deraigns title, were parties to this same proceeding, having come in as litigants with the Camous over the right to denounce the *demasias*. This fully appears in defendant's Exhibit H. (R., 349.)

Upon the whole record it is not believed that there can be any doubt that the grant, when considered one by outboundaries, is entirely within Mexico.

#### IV.

*This grant has been satisfied by the Mexican Government south of the international line, and the claim should therefore be rejected.*

It was held by this court in *Ainsa v. United States* (161 U. S., 234), as follows:

We have referred to the proceedings of 1882-1886 in Mexico as furnishing persuasive evidence of the proper construction of this grant under Mexican law, and it may be further observed that the adjudication of the overplus required the location of the  $7\frac{1}{2}$  *sitios*, which location Mexico, as the granting Government, assumed it had the right to make and made out of the land within its jurisdiction. In this way the grant was satisfied by the receipt of all the

grantees had bought and were entitled to under the Mexican law, the result as to the overplus inuring to Camon's cotenants by the terms of his petition.

This principle was reaffirmed in *Ely's case* (171 U. S., 240), where, in discussing the Ainsa case, it is said:

In that [the Ainsa] case it appeared that while the boundaries of the survey extended into the territory ceded by Mexico to the United States the grantee had taken and was in possession of land still remaining within the limits of Mexico, to the full extent which he had purchased and paid for, and therefore no legal or equitable claim existed against the United States in reference to the land within the ceded territory.

These cases are absolutely controlling upon the record now under discussion. Here as there the quantity purchased and paid for has been satisfied by the Mexican Government out of lands within its jurisdiction on the application of claimant's predecessors in title. In this grant the area purchased and paid for was  $6\frac{1}{2}$  short *sitios*. In the *demasias* proceeding of 1880-1886 (R., 212-231) the Mexican Government found the total area within the Agua Prieta grant and its associated grants to be 68.9 *sitios*, the area covered by the title (including the Agua Prieta  $6\frac{1}{2}$  short *sitios*) to be 28.7 *sitios*, and the *demasias*, or difference between the total area and the legal area, to be 40.2 *sitios*. Acknowledging Camou's ownership in the 28.7 *sitios*



by virtue of his ancient titles, the Mexican Government sold and patented to the denouncers the overplus of 40.2 *sitios*. As has been heretofore pointed out, every foot of said legal area of 28.7 *sitios*, as well as of said total area of 68.9 *sitios*, is within Mexican territory. The Mexican Government having out of its own lands satisfied its obligations growing out of one of its grants, the United States is under no obligation, legal or equitable, to satisfy that obligation a second time.

It is respectfully submitted that upon all the grounds herein urged the judgment of the Court of Private Land Claims was correct and should be affirmed.

Respectfully submitted.

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